Supreme Court, U.S.
FILED

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No. _____

In the
Supreme Court of the United States

MILLER WASTE MILLS, INC.,
d/b/a RTP COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

International Union, United Automobile,
Aerospace & Agricultural Implement Workers
of America, AFL-CIO-CLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Is the remedy of an affirmative bargaining order "for a reasonable period of time" – as opposed to a bargaining order conditioned on the outcome of a Board-conducted election to determine whether the employees actually want the union's representation – appropriate in light of the employees' statutory right to choose their own representative (or none at all), where the Board delayed issuing the order for over three years after the case was tried, where there is no evidence that an actual numerical majority of the bargaining unit employees ever supported the union, and where the Board refused to consider evidence of employee turnover and changes within the workplace during the Board's delay?

(2) Does the National Labor Relations Act permit the Board to conclude that an employer's withdrawal of recognition from the union was unlawful, where the union lacked majority support at the time of the withdrawal, evidence of employee disaffection pre-dates the employer's alleged unfair labor practices ("ULPs"), and where the Board presents no testimony confirming a causal connection between the employer's alleged ULPs and the loss of support for the union?

(3) Do letters from an employer to its employees that "accurately summarized events" constitute unlawful direct dealings, where the union waived its right to bargain over the subject matter of the letters?

(4) Does an employer violate the Act when it interviews an employee to prepare for a ULP hearing, where the employer advises the employee that participation in the interview is voluntary and the employee testifies that he voluntarily provided information to the employer?

STATEMENT PURSUANT TO RULE 29.6 AND DESCRIPTION OF PARTIES

Petitioner Miller Waste Mills, Inc., d/b/a RTP Company (hereinafter "RTP" or "the Company"), is a privately-owned Minnesota corporation engaged in the thermoplastics industry. RTP operates facilities in the United States and Europe. No parent company or publicly-held company owns 10% or more of RTP's stock. The facility involved in the instant case is located in Winona, Minnesota.

Respondent National Labor Relations Board is an agency of the United States Government.

Respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (hereinafter the "UAW" or "the Union") is an unincorporated labor organization representing several hundred thousand employees in the United States. The UAW is a member of the AFL-CIO. The UAW was the Intervenor below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The NLRB's Decision, which incorporates part of the initial Decision and Recommendation of the Board's Administrative Law Judge, is reported at 334 NLRB No. 69 (2001). *See* Appendix ("Appx.") B. The Board's Order denying RTP's Motion to Reopen the Record is attached at Appx. C.

The Court of Appeals' Opinion on the merits enforcing the Board's Order is published at 315 F.3d 951. (*See* Appx. A).

STATEMENT OF JURISDICTION

The Court of Appeals entered its Opinion and Order on January 10, 2003. The Court of Appeals had jurisdiction pursuant to 29 U.S.C. § 160(f). Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* that are relevant to this Petition are reprinted in Appx. D.

STATEMENT OF THE CASE

RTP's facility in Winona has been unionized for over forty years, with the employees initially being represented by the Oil, Chemical and Atomic Workers Union, and more recently, by the Winona Free Union. (T. 123-25). The relationship between RTP and the UAW dates back to February of 1996, when an affiliation vote occurred between the Winona Free Union and the UAW. *See RTP I*, 323 NLRB 15 (1997). At the time of that vote, Respondent employed approximately 220 bargaining unit employees. *Id.* at 16. Many bargaining unit members did not vote, and the affiliation passed with the approval of only 36% of the bargaining unit. (*Id.* at 17-18; T. 208-209).

The subsequent dissatisfaction expressed by the employees over the circumstances surrounding the "affiliation" vote caused RTP to question the UAW's claim that the affiliation vote was conducted properly. This challenge ultimately led to the litigation of the first NLRB Complaint against RTP, which RTP lost. *RTP I*, 323 NLRB 15 (1997). RTP chose not to seek judicial review and made the business decision to move forward to negotiate a contract. (T. 127-28). RTP complied with all aspects of the Board's first remedial Order, and the NLRB subsequently issued a Certification of Compliance to RTP. (T. 132).

RTP and the UAW then entered into negotiations over the terms of a new collective bargaining agreement during 1997. This Petition is not the proper forum to repeat the entire history of those negotiations. Suffice it to say that while some progress was achieved, by December of 1997, negotiations had bogged down. (Appx. B-26 to B-35).

A lynchpin to the Board's decision in this case is a January 2, 1998 letter from RTP to its employees. This letter and two subsequent communications from RTP form the

foundation of the Board's conclusions in this case, because (according to the Board) these communications "tainted" the employees' opinions about the UAW, which then led to the UAW's "loss" of majority support and in turn, RTP's corresponding withdrawal of recognition in February of 1998. (Appx. B-3 to B-13).

The background behind RTP's January 2, 1998 letter involves a tentative agreement between the UAW, the Company and a Federal Mediator when negotiations turned for the worse in December of 1997. Throughout its history, RTP had typically announced a wage raise around the first of each calendar year. Given that the parties were in the midst of negotiations, RTP was not inclined to unilaterally raise wages until an agreement on a final contract package (which addressed all issues in dispute, including wage rates) was reached.

Consequently, during the December 1997 bargaining sessions, the parties reached a tentative two-part agreement. First, given the ongoing doubts as to whether the UAW actually enjoyed the support of the majority of employees in the bargaining unit, the Company and the UAW tentatively agreed – with the approval of the Federal Mediator – that an election would be held to determine if the UAW actually had majority support. (*See* Appx. B-34 to B-35). In turn, the Union promised not to file any unfair labor practice charges against RTP if RTP raised wages and improved health benefits at the turn of the year. *Id.* The Union specifically assured RTP that if such a wage increase was granted, it would not be made the basis for any unfair labor practice charge. This assurance was noteworthy, because in the previous year, the UAW filed unfair labor practice charges against RTP for granting such an increase. *Id.*

Accordingly, at the end of the December 1997 meeting, the understanding was that the Union and the Company had a tentative agreement to conduct an election to determine majority status, and therefore RTP would consider implementing the wage increase, even though a contract had not been reached. That necessarily meant that negotiations regarding a contract would be suspended pending the outcome of the election.

After a delay of several weeks, the UAW contacted RTP and stated that the UAW would no longer agree to an election. (Appx. B-36). Given the UAW's sudden cancellation of the election, negotiations would necessarily need to proceed on all issues (including wages and benefits), and RTP advised its employees in the January 2, 1998 letter of this "fiasco" and that the subject of any wage increases or insurance adjustments would once again become the subject of bargaining. (*See* Appx. B-36 to B-37).

In response, the UAW demanded that RTP still provide the wage raise, under threat of a ULP Charge if it did not. In addition, the employees presented the Company with a petition signed by half of the bargaining unit asking RTP to provide the traditional annual raise and to improve benefits -- which is exactly what the UAW had already authorized the Company to do -- even without an election and even though negotiations would have to continue. (Appx. B-37). After considering these requests, RTP proceeded to raise wages and benefits and advised the employees in writing of its decision on January 16, 1998, as RTP had traditionally done. (Appx. B-37 to B-38). One month later, RTP also announced reductions in insurance costs to the workforce, in accordance with RTP's December 1997 discussions with the UAW about benefit modifications. *Id.*

Following the Union's revocation of its tentative agreement to hold an election, the parties scheduled another

bargaining session for February 26, 1998. (Appx. B-38 to B-40). For reasons that only the employees could know for certain, at some point prior to the February 26, 1998 meeting, several employees began circulating a Petition to get rid of the UAW. The Petition, stating simply but effectively that "**we no longer wish to be affiliated with the UAW, and I do not want the UAW to represent me**," was signed by 129 of the 198 bargaining unit employees, or 65% of the bargaining unit workforce. (Appx. A-4). It is undisputed that the Petition is authentic, that there is no evidence that any employee was coerced or tricked into signing it, and that no agent of RTP was involved in the process. (*See* Appx. B-39; B-38 n.12).

Prior to February 25, 1998, the date on which RTP received official notification from an attorney representing the employees that a "clear majority" of the employees had signed this Petition (Appx. B-38), RTP was already aware of a number of facts indicating less than majority support for the UAW, including:

a. There had been at least one and perhaps two prior attempts by the employees to remove the UAW as the bargaining representative, which the NLRB refused to process. (T. 204, T. 299). There had been "constant turmoil" between and among employees ever since the affiliation with the UAW. (T. 208).

b. Only 74 out of 200 bargaining unit employees belonged to the UAW in April of 1997 (nearly a year before the alleged ULPs were committed), and the UAW only had 55 members in February of 1998. (Appx. B-38, n.13).

c. The Union spent approximately 4 hours on December 11, 1997 discussing whether or not it had majority support, ultimately culminating in the agreement to conduct an election to address whether it actually had majority support. (*Id.*; T. 207; 843-844).

d. The Union conducted a survey of bargaining unit members in the summer of 1997, and only received approximately 30 responses out of 200 employees. (T. 209).

e. There had been significant Union officer turnover, with union officers quitting and not being replaced. (T. 210-11).

f. Bargaining unit members who worked as "supervisors" expressed dissatisfaction with the UAW over the Union's attempt to remove them from the bargaining unit, which would have denied them overtime pay. (T. 404-05).

Based on these and other indicators of employee disaffection with the UAW (many of which predated RTP's three letters in early 1998), when presented with corroborating evidence in the form of the Petition demonstrating that a clear majority of the employees did not want the UAW to represent them, RTP withdrew recognition on February 26, 1998. (Appx. B-39).

The UAW responded to the withdrawal by filing a host of unfair labor practice charges against RTP. In the Complaint underlying the Order at issue here, the NLRB General Counsel initially alleged no less than five separate categories of unfair labor practices that RTP supposedly committed during 1997 and 1998:

1. refusing to bargain "in good faith," (otherwise known as "surface bargaining") with the UAW since September of 1997;

2. bypassing the Union and dealing directly with employees beginning in January 1998;

3. unlawfully withdrawing recognition of the UAW in February of 1998;

4. unlawfully making unilateral changes by providing a wage increase, improving benefits, ceasing to honor dues check-off, and refusing to permit employees time off for Union business in 1998; and

5. refusing to provide information requested by the Union since February 16, 1998.

This case was tried almost five years ago before the Board's Administrative Law Judge ("ALJ"), Arthur J. Amchan, on June 16-19 and July 7-8, 1998. (Appx. B-23). Immediately before resting, the Board amended the Complaint to add two additional allegations, namely that RTP: (1) violated Section 8(a)(1) by conducting a "coercive" pre-trial interview of an employee regarding his Union sympathies, and (2) violated Section 8(a)(2) by unlawfully rendering "financial and other assistance" to the Winona Free Union, which by then was competing with the UAW for majority support. At trial, neither the Board nor the UAW presented any witnesses to testify that RTP's conduct in January and February of 1998, as opposed to UAW malfeasance, actually led to disenchantment with the UAW.

On September 22, 1998, the ALJ issued a split decision. The ALJ rejected the General Counsel's allegation that RTP engaged in bad-faith surface bargaining, finding that:

> . . . I cannot conclude that [RTP] engaged in surface bargaining . ... [T]he Union was at least as much at fault for the lack of progress as [RTP].
>
> * * *
>
> [RTP] cannot be saddled with responsibility for the fact that negotiations were not completed by the end of 1997, or the predicament in which the Union found itself as a result.
>
> * * *

> The Union wasted much of the negotiating sessions on issues that appear to have either had no merit, or were not well thought out. . . . [t]here appears to be absolutely no basis for [some of] the assertions made by the Union at the bargaining sessions.
>
> * * *
>
> The fact that so much of the parties' time in negotiations was spent unproductively discussing the supervisor issue appears to be the responsibility of the Union, not [RTP].

(*See* Appx. B-43, 44). However, the ALJ (and in turn the Board and the Eighth Circuit) held that RTP did commit unfair labor practices via three letters to the employees in January and February of 1998 that allegedly "tainted" the employees' February 25, 1998 Petition to oust the UAW.

The ALJ held that although the January 7, 1998 letter "accurately summarized the events" occurring at the time (Appx. B-45), the letter nevertheless tended to "blame the UAW" and thereby "tended to restrain employees in the exercise of their Section 7 rights . . . in violation of Section 8(a)(1)." *Id.* In turn, although the ALJ (and eventually, the Board) found that the Union waived its right to bargain over the wage increase and changes to insurance costs, and that RTP's decision to implement the wage increase was proper, the manner in which RTP announced those changes unlawfully caused employee disaffection with the UAW. (Appx. B-6 to B-10; B-46, n.19).

In other words, the ALJ held that the "impression" created by the allegedly unlawful January 2 letter caused employees to become "alienated" from the Union, and in turn "tainted" the Petition that the majority of the employees presented to RTP to oust the UAW. Consequently, the ALJ held that RTP's subsequent withdrawal of recognition of the UAW was invalid, because RTP could not rely upon the allegedly tainted

Petition to question the UAW's majority status. The ALJ, and in turn, the Board, summarily rejected a host of other evidence (beyond the Petition) demonstrating the lack of majority status and held that:

> While [RTP] had evidence of some disaffection with the Union, I conclude that it did not have any objective basis for a reasonable doubt that the Union lacked majority support that was untainted by its unfair labor practice.

(Appx. B-52) (emphasis added).

The ALJ also found that RTP's *post*-withdrawal of recognition refusals to provide information to the Union and "direct dealings" with employees were unlawful because the withdrawal itself was invalid. Finally, the ALJ held that RTP violated the Act during RTP's pre-trial interview of former Union Officer Ken Erickson.

The ALJ concluded by recommending, *inter alia*, the remedy of an affirmative bargaining order, even though the UAW did not hold majority support in February of 1998, and there is no evidence confirming that the UAW has ever enjoyed the support of an actual numerical majority of employees in the bargaining unit. (Appx. B-49; B-59).

The parties filed Exceptions and Cross-Exceptions to the ALJ's decision in October and November of 1998. *The parties then heard nothing back from the Board for years.* Finally, the Board issued the July 11, 2001 Order at issue here, wherein the Board concluded that:

(1) RTP violated Section 8(a)(1) of the Act by issuing letters to employees on January 2, January 16, and February 13, 1998;

(2) those three unlawful letters caused the disaffection with the Union that resulted in the employees' Petition to get rid of the Union; and

(3) RTP withdrew recognition "solely" based upon the tainted Petition, and all of the other evidence of the employees' disaffection with the UAW that was unrelated to the three letters was "irrelevant."

(Appx. B-6 to B-12; B-13).

Moreover, even though over three years had passed since the ALJ's Decision, and over three and one-half years had passed since the occurrence of the underlying events, the Board issued a remedy that included, among other things, an affirmative bargaining order requiring the employees and RTP to accept the UAW's representation for some undetermined "reasonable period" of time. (Appx. B-17 to B-20).

Shortly after the Board issued its Decision, RTP filed a Motion to Reopen the Record. By that Motion, RTP sought the Board's permission to reopen proceedings at which time RTP could then present additional testimony and evidence related to the propriety of the affirmative bargaining order remedy. Specifically, RTP sought to introduce evidence of a change in management, the effects of the passage of time, and substantial employee turnover, all of which would have demonstrated that an unconditional bargaining order issued over three years after the alleged ULPs were committed was improper because no one had any idea whether RTP's workforce in 2001 actually wanted the UAW's representation.

Without ruling on RTP's Motion, the Board petitioned the Eighth Circuit Court of Appeals for enforcement. After the Board realized this "inadvertence" (and after RTP had briefed the case to the Eighth Circuit), the Board moved the Court of Appeals to remand the case so that the Board could address RTP's Motion. On December 10, 2001, that Court

granted the Board's motion and remanded the case to the Board to consider RTP's unaddressed Motion.

Over three additional months then passed. Then, after a status inquiry from the Eighth Circuit, by Order dated March 25, 2002 the Board denied RTP's Motion and returned to petitioning for enforcement at the Court of Appeals. (Appx. C). After considering the Board's Petition on the merits, the Eighth Circuit issued a Decision enforcing the Board's Order in all material respects. (Appx. A).

In enforcing the Board's conclusion that RTP had committed ULPs which led to a loss of majority support for the UAW, the Eighth Circuit seemed to rely on the allegations of bad-faith surface bargaining, stating that "we find particularly egregious Miller Waste's failure to bargain with the union in good faith after it had been certified to represent the employees." (Appx. A-7). However, RTP had actually prevailed on that issue before the ALJ, and the Board neither modified the ALJ's conclusion nor presented that issue to the Eighth Circuit. (Appx. B-43, 44; B-2, n.3).

As to the remedy, the Eighth Circuit declined to condition the Board's bargaining order on the outcome of a Board-conducted election to determine if the employees (now in 2003, five years after the alleged ULPs) actually want the UAW's representation, and held that the Board did not abuse its discretion refusing to reopen the record to consider evidence of how circumstances changed over the course of the Board's delay in deciding this case. (Appx. A-8).

REASONS FOR GRANTING THE WRIT

I. Summary of Argument.

This Writ should be granted for two fundamental reasons. *First*, the Board's Decision in this case jeopardizes perhaps the most important right provided by the National

Labor Relations Act -- that of employees (not the Government) to select union representatives of their own choosing, or to select none at all. A bargaining order removes that choice from employees and assigns it to the Board, and that is why such orders must be issued sparingly. While sometimes appropriate, the Board's cavalier, ever-evolving approach in routinely imposing affirmative bargaining orders in this case and others like it has done nothing but generate confusion and inconsistency in the Circuit Courts of Appeal and within the Board's own decisions.

A case wherein the union enjoyed majority support before the employer's serious ULPs caused a loss of that support might warrant a bargaining order, especially if the Board issued that order promptly after trial after considering any material changes in the workforce. That case would probably not warrant this Court's attention.

That is not the situation here, nor is that the situation in scores of other similar cases decided by the Board in recent years. Here, even putting aside (for now) the Board's analysis on the liability issues, the Board's rationale and procedure for issuing a bargaining order in this context should be questioned. This Union never proved that a numerical majority of bargaining unit employees wanted its representation at any time. The Board failed to present the testimony of even one witness confirming that it was the Company's conduct – instead of the UAW's own misdeeds – that sowed the seeds of discontent leading up to the Petition confirming that the employees did not want the UAW's representation. Undaunted by that fact, the Board then took over three and one-half years to decide this case and impose the bargaining order, which forces the Company to bargain with an artificially appointed union which the employees cannot remove or decertify by law for an undefined "reasonable period of time." Then, when the Company

moved for the opportunity to present testimony and evidence showing, among other things, that many of today's employees were not even working at RTP when the underlying events occurred (and therefore the Board cannot possibly know their sentiments regarding the UAW), instead of granting that request and thereby taking every reasonable measure to protect the employees' Section 7 rights, the Board first ignored, and then flatly denied, RTP's motion.

The real question regarding the remedy in this case is this. In these circumstances, *assuming arguendo* the Company's liability for the ULPs alleged, is the appropriate remedy a bargaining order with its associated decertification bar? Or should that order be conditioned on (1) an analysis by the Board of how conditions and the composition of the workforce has changed at the workplace during the Board's prolonged delay, and on (2) a Board-conducted election, with all of its safeguards, which allows the current employees to make that choice themselves? RTP respectfully asks this Court to answer these questions and put the inconsistency in addressing these issues below to rest.

Second, this case bears review because in analyzing the Company's liability for the alleged ULPs (direct dealing and "blaming the Union," which in turn led to the "loss" of majority support for the UAW and "tainted" the Company's eventual withdrawal of recognition), the Board and the Court of Appeals departed from any semblance of following the normal course of judicial proceedings. Once again, the Board made law and policy under the guise of fact-finding. As addressed both below in this Petition and in the cases of this Court, to be entitled to deference, the Board cannot subjectively pick and choose to rely on only the evidence that serves to support its conclusions, but instead must fairly consider the record in its entirety.

Here, the Board failed to do so in a series of related respects. For example, the Board found that the UAW's "loss" of support was solely caused by the Company's actions, without presenting the testimony of even one witness to testify as such. The Board may be the expert in the field of labor relations, but it is not clairvoyant. Likewise, the Board held that the Company withdrew recognition "solely" because of the supposedly tainted employee Petition, and disregarded as "irrelevant" a host of other evidence confirming an independent basis to question the UAW's majority status.

In the same vein, it is difficult to discern how letters that (as the ALJ found) "accurately summarized events" regarding issues that (as the Board held) the Union waived bargaining over still constituted unlawful "direct dealing." Finally, there appears to be no rational way for the Board to find an employer guilty of unlawful "coercion" of a witness when, in conducting a pretrial interview of that witness in order to defend itself against the Board's charges at trial, the employer advises the employee in writing that he does not have to participate in the interview and the employee later testifies at trial that he wanted to tell the employer what he knew about the Board's allegations.

On these issues, RTP recognizes that this Court does not typically accept review to resolve factual disputes. However, the remarkable aspects of the factual conclusions in this case are not only the conclusions themselves, but the manner in which those conclusions were reached. RTP respectfully submits that the Board found only what it wanted to find, and the Court of Appeals' acceptance of that procedure should be reviewed.

II. Argument.

A. The Remedy Below Should Be Reviewed Because it Undermines an Important Federal Right, Contravenes Precedent, and Reflects a Growing Split of Authority.

Section 8(a)(5) of the National Labor Relations Act provides that it is unlawful for an employer "to refuse to bargain collectively with the representatives of his employees" where those representatives have the support of the majority of the employees. 29 U.S.C. § 158(a)(5); *Allentown Mack Sales and Service, Inc. v. NLRB*, 552 U.S. 359, 118 S.Ct. 818, 822-24 (1998). However, of paramount importance is the employees' right to bargain through "representatives of their own choosing" or to not be represented at all. *See* 29 U.S.C. § 157. With respect to the obligations of an involved employer, "it is equally clear that an employer need not, and indeed must not, bargain with an uncertified union . . . which loses its majority status as a result of repudiation by the employees." *NLRB v. Clegg*, 304 F.2d 168, 175 (8th Cir. 1962) (emphasis added).

In cases such as this, a bargaining order carries a "decertification bar," meaning that once the order takes effect, the employees are precluded from seeking to decertify the incumbent union, select a different union, or select none at all, for an undefined "reasonable period of time."[1] (Appx. B-14,

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[1]In the case at Bar, the Board offered no guidance as to what might constitute a "reasonable period of time." Oddly, however, in a decision issued two weeks *before* the decision in this case, the Board clarified (in response to an adverse ruling from the D. C. Circuit) that "a reasonable time for bargaining before the union's majority status can be challenged will be no less than six months, but no more than 1 year," apparently depending "on a multifactor analysis." *Lee Lumber and Building Material Corp.*, 334 NLRB No. 62 (June 28, 2001). It remains

B-17). Because bargaining orders interfere with this free choice, bargaining orders must be used "sparingly," in cases where the Board "finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies . . . is slight . . . ." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614-615, 89 S.Ct. 1918, 1940 (1969). That principle – that bargaining orders are *not* routine but instead are reserved for exceptional cases – is where the first signs of a split of authority appear.

The Board takes the position that "an affirmative bargaining order is 'the traditional, appropriate remedy'" in this context (Appx. B-14, 15) and "is not considered an extraordinary remedy requiring detailed case-specific justification." (Board's Brief to Eighth Circuit at 46). The Board will undoubtedly contend here, as it has before, that at least two Circuits agree. *NLRB v. Williams Enterprises, Inc.*, 50 F.3d 1280, 1289 (4th Cir. 1995); *NLRB v. Beverly Health & Rehabilitation Services, Inc.*, 187 F.3d 769, 771 (8th Cir. 1999). Given the outcome of this case, the Eighth Circuit apparently concurs.

Other Circuits do not. *See, e.g., Lee Lumber and Building Material Corp. v. NLRB*, 117 F.3d 1454, 1461-62 (D.C. Cir. 1997, overruling in part 332 NLRB 175 (1996) (bargaining orders viewed with suspicion, reserved as remedy for extraordinary cases); *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 739 (D.C. Cir. 2000) (noting Board's "stubborn refusal" to balance (1) employees' Section 7 rights; (2) whether other purposes of Act override right to choose bargaining representative; and (3) whether alternative remedies are adequate); *NLRB v. Superior Fireproof Door &*

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unclear whether the Board would adhere to the same standard in the Eighth Circuit in this case, or whether the Board has adopted a Circuit-by-Circuit approach to bargaining orders.

Sash Co., 289 F.2d 713 (2nd Cir. 1961) (refusing to unconditionally enforce bargaining order in favor of incumbent union in light of employees' Section 7 rights); *NLRB v. Pilgrim Foods, Inc.*, 591 F.2d 110, 120 (1st Cir. 1979) ("bargaining order should be enforced only when an election is not feasible"); *NLRB v. LaVerdiere's Enterprises*, 933 F.2d 1045, 1053-54 (1st Cir. 1991) (in withdrawal of recognition case, Board must consider election over bargaining order); *Henry Bierce Co. v. NLRB*, 23 F.3d 1101, 1110 (6th Cir. 1994) (in withdrawal of recognition case, bargaining order is "extraordinary remedy that 'we scrutinize very closely'").

This case presents a classic example of the conflict between the Board's "stubborn" adherence to its belief that it is free to issue bargaining orders on a routine and almost nonchalant basis, and the holdings of this Court and some of the Circuit Courts emphasizing that bargaining orders must be used "sparingly," and only then when carefully justified and explained in the context of the facts of each case. Here, in imposing the bargaining order, the Board first reiterated that such orders are standard in its cases. (Appx. B-14, 15). However, in an apparent tip-of-the-hat to those Courts that have required the Board to at least explain the factual basis for why a bargaining order is appropriate in a given case, the Board appeared to undertake a "reasoned" justification for its bargaining order, while still "disagree[ing]" that it needed to do so at all. (Appx. B-15 to 17).

The problem is that the Board's supposedly case-specific justification for its bargaining order is nothing of the kind. In fact, the "justification" authored by the Board in this case is essentially the same boilerplate language that the Board used to "justify" bargaining orders in at least 23 cases

over an 18-month period in order to placate otherwise reluctant Courts of Appeal.[2]

The split of reasoning and authority widens when it comes to the next factors in this case – the effect of the Board's own delay on the propriety of its bargaining order, and its refusal to consider evidence of how circumstances

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[2]*Bridgestone/Firestone, Inc.*, 337 NLRB No. 20, 2001 WL 1691781, *3-4 (NLRB, Dec. 20, 2001) (offering "reasoned analysis" nearly verbatim to that offered in this case); *In re Horizon House Developmental Services, Inc.*, 337 NLRB No. 9, 2001 WL 1663713, *7-8 (NLRB, Dec. 19, 2001) (same); *In re Penn Tank Lines, Inc.*, 336 NLRB No. 112, 2001 WL 1544272, *5-6 (NLRB, Nov. 29, 2001) (same); *In re S. Bent & Bros.*, 336 NLRB No. 72, 2001 WL 1261817, *3-4 (NLRB, Oct. 1, 2001) (same); *In re E.S. Sutton Realty Co.*, 336 NLRB No. 33, 2001 WL 1243613, *6-7 (NLRB, Sept. 28, 2001) (same); *Williams Energy Services*, 336 NLRB No. 11, 2001 WL 1580200, *3 (NLRB, Sept. 28, 2001) (same); *Transpersonnel, Inc.*, 336 NLRB No. 39, 2001 WL 1806899, *4-5 (NLRB, Sept. 28, 2001) (same); *In re Trans-Lux Midwest Corp.*, 335 NLRB No. 22, 2001 WL 991542, (NLRB, Aug. 27, 2001) (same); *In re Crown Textile Co.*, 335 NLRB No. 12, 2001 WL 1001238, *4 (NLRB, Aug. 27, 2001) (same); *In re Marion Hosp. Corp.*, 335 NLRB No. 80, 2001 WL 1126579, *6-7 (NLRB, Aug. 27, 2001) (same); *In re Metro Health, Inc.*, 334 NLRB No. 75, 2001 WL 814951, *4-5 (NLRB, July 16, 2001) (same); *Wyndham Palmas del Mar Resort and Villas*, 334 NLRB No. 70, 2001 WL 811083, *6-7 (NLRB, July 13, 2001) (same); RTP I, 334 NLRB No. 69, 2001 WL 803445, (NLRB, July 11, 2001) (same); *Park Associates, Inc.*, 334 NLRB No. 55, 2001 WL 708343, *3 (NLRB, June 20, 2001) (same); *In re Hampton Lumber Mills-Washington, Inc.*, 334 NLRB No. 30, *2-4 (NLRB, May 31, 2001) (same); *In re Inn Credible Caterers, Ltd.*, 333 NLRB No. 110, 2001 WL 362679, *1-3 (NLRB, Apr. 9, 2001) (same); *In re Scott*, 332 NLRB No. 163, 2000 WL 33115417, *2-3 (NLRB, Dec. 26, 2000) (same); *In re Ryan Iron Works, Inc.*, 332 NLRB 49, 2000 WL 1504675, *3-5 (NLRB, Sept. 29, 2000) (same); *In re Bridgestone/Firestone, Inc.*, 332 NLRB No. 56, 2000 WL 1563168, *4-5 (NLRB, Sept. 29, 2000) (same); *In re Scepter Ingot Castings, Inc.*, 331 NLRB 1509, 331 NLRB No. 153, 2000 WL 1234702, *2-3 (NLRB, Aug. 28, 2000) (same); *Nicholas County Health Care Center, Inc.*, 331 NLRB 970 (Aug. 9, 2000) (same); *In re Raven Ser. Corp.*, 331 NLRB 651 (June 30, 2000) (same).

changed during that delay. Here, the Board obviously thought its unexplained three and one-half year delay in deciding this case was irrelevant, refused to condition its order on an election, and even refused to allow RTP to reopen the record and present evidence on why a bargaining order makes no sense for the employees of today, as opposed to those employed back in February of 1998.

For its part, the Eighth Circuit previously espoused the proposition that an election -- not an affirmative bargaining order -- should be the remedy when majority status is in doubt, especially after a long delay. *Clegg*, 304 F.2d at 177 ("[w]e feel that the only reasonable solution is to afford the employees the opportunity of a supervised election. The passage of time makes this particularly feasible"). In addition, the Eighth Circuit previously admonished the Board for its failure to consider evidence of changed circumstances following a delay in the issuance of a bargaining order. *NLRB v. Cell Agricultural Mfg. Co.*, 41 F.3d 389, 397-99 (8th Cir. 1994). Given its decision in this case, the Eighth Circuit has apparently joined the Board in concluding that considering evidence of changed circumstances is now unnecessary.

Once again, other authorities run contrary. As a preliminary issue, the NLRB is subject to the requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et. seq.* *See Texas Petrochemicals Corp. v. NLRB*, 923 F.2d 398, 404 (5th Cir. 1991). "One of the seminal requirements of the APA is that an agency endeavor to 'conclude a matter presented to it' within a 'reasonable time.'"[3] *Id.* (citing 5 U.S.C. § 555(b)).

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[3]To RTP's knowledge, this Court has never expressly ruled on the APA's timeliness requirement as applied to actions of the Board in issuing an affirmative bargaining order. In *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107 (1962) this Court commented in a footnote that "[i]nordinate delay in any case is regrettable, but Congress has introduced no time limitation into

Several Courts of Appeal have relied on the APA and employees' Section 7 rights to reign in bargaining orders issued after inordinate delays or where the Board fails to consider the practical changes in the workplace resulting from the Board's delay. *See Texas Petrochemicals Corp., supra* (conditioning enforcement of bargaining order on results of Board-conducted election); *Overnite Transp. Co. v. NLRB*, 280 F.3d 417, 436-38 (4th Cir. 2002) (election, not bargaining order, is traditional remedy; "the Board refuses to follow the clear and established precedent of this Circuit that both the passage of time and employee turnover are highly relevant matters to be considered"); *NLRB v. Orland Park Motor Cars*, 309 F.3d 452, 457 (7th Cir. 2002) (Board might well abuse discretion if it ignores evidence of changed circumstances between time of employer's ULPs and the issuance of Board's bargaining order); *NLRB v. Superior Fireproof Door & Sash Co., Inc.*, 289 F.2d 713, 723-724 (2nd Cir. 1961) (conditioning enforcement of bargaining order upon election).

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the Act except that in Section 10(b)." *Katz*, 82 S.Ct. at 1114, n.16. Accordingly, relying on this Court's previous decision in *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 64 S.Ct. 817, this Court in *Katz* denied the employer's request that the Board's Order be conditioned on a new election because the employees had apparently repudiated the Union at some point before the Board issued a cease and desist order. *Id.* However, *Franks Bros.* did not involve an employer's allegedly unlawful withdrawal of recognition from an incumbent union, nor was that issue before the Supreme Court in *Katz*. Moreover, in *National Licorice Co. v. NLRB*, 309 U.S. 350, 359 (1940) this Court noted without modification that the Court of Appeals below had made the Board's bargaining order conditional "upon a determination by an election that the Union is still the choice of the majority of the employees." In any event, the relevant provision of the APA had not yet been enacted at the time of *Katz* and *Franks Bros.*, and neither of those cases involved an employer that withdrew recognition from the union and was then ordered to bargain with that union three and one-half years after the fact.

As the Second Circuit noted when ordering a Board-conducted election in *Superior Fireproof*:

> Nor may we forget that the interests to be protected are primarily those of the employees, importantly including, of course, their right to effective union representation rather than of the union itself.

Id. at 724 (emphasis added). The same is true here. At this point, after delaying its review of the ALJ's decision for nearly three years, and given that over five years have now passed since the withdrawal of recognition, the Board has no objective basis to suppose that the UAW enjoys the support of a majority of the employees. As stated in *Texas Petrochemicals*:

> [U]nder all of the facts in this record, including the Board's lengthy delay, were we to enforce this bargaining order without ascertaining the employees' present desires, it would be tantamount to ignoring their statutory rights. Moreover, our decision today effectuates the intent of the NLRA, which was enacted not to further union membership or to deter it but to further employee choice and to provide an effective mechanism for realizing that choice. The most effective means for determining employee sentiment is through a Board sponsored election with its attendant protections . . . If the employees choose the union, enforcement shall be granted; if they choose not to vote for the union, the bargaining order will be denied.

Texas Petrochemicals, 923 F.2d at 406 (emphasis added).

Another factor that arose in this case and many other cases that warrants attention is the lack of any demonstration that the Union had the support of a numerical majority of the employees prior to the alleged ULPs at issue. *See, e.g., Gissel*, 89 S.Ct. at 1940 (Board's authority to issue bargaining

order contingent on "a showing that at one point the union had a majority"). Even the case upon which the Eighth Circuit relied on in enforcing the bargaining order in this case, *NLRB v. Lorillard Co.*, 314 U.S. 512, 62 S.Ct. 397 (1942), involved an incumbent union that had the support of "a majority of Lorillard's employees." *Id.*

In this case, the bargaining order should be questioned if for no other reason than the fact that the UAW never demonstrated a numerical majority and undisputedly did not hold majority status when 129 out of 198 employees signed the Petition in February of 1998.

Consequently, regardless of the UAW's support in 1998, a bargaining order is suspect because the Board failed to make any showing that the numerical majority actually supported the UAW at any time, much less when RTP withdrew recognition. (T. 463-465); *see, e.g., Henry Bierce Co. v. NLRB*, 23 F.3d 1101 (6th Cir. 1994) (bargaining order not appropriate unless union possessed majority status *and* factual findings demonstrate that election is inappropriate because causal connection exists between ULP and probability that no fair election could be held); *Albany Steel, Inc.*, 17 F.3d at 571-72 (where there was some evidence of lack of union support, but employer improperly withdrew recognition, election, not bargaining order, was proper).

In short, this case may well "be a classic case where use of a bargaining order would force a union on unwilling employees." *Lee Lumber*, 117 F.3d at 1462. As one Circuit Judge recently put it when addressing the Board's delays and unreasonableness in another recent case, it was the Board and not the employer that:

> deprived the employees of their right to choose their own bargaining representative or none at all. . . . [T]he National Labor Relations Board has resorted to foot

> dragging, suspicious remands, and even the entry of an unlawful bargaining order to prevent the employees . . . from exercising their rights of labor democracy . . . [I]t was the unlawful acts of the Board and not those of [the employer] that have deprived [the employees] of free choice for these many years.

Lee Lumber and Building Material Corp. v. NLRB, 310 F.3d 209, 219-220 (D.C. Cir. 2002) (Sentelle, Circuit Judge, concurring).

In sum, questions concerning representation and any resulting bargaining orders "raise serious and important questions which recur with frequency before the NLRB." *John Cueno, Inc. v. NLRB*, 103 S.Ct. 831 (Mem., Jan. 24, 1983) (Rehnquist, C.J., joined by Justice Powell, dissenting from denial of certiorari). RTP respectfully submits that the time is ripe for this Court to revisit the propriety of a bargaining order to resolve the split of authority and to clarify the circumstances under which Section 7 of the Act permits the Board to impose unconditional bargaining orders following a lengthy delay and the Board's refusal to consider changed circumstances.

B. Certiorari Should Be Granted Because the Board's Conclusions, as Enforced by the Court of Appeals, Depart from the Accepted Course of Judicial Proceedings and Conflict with Precedent of this Court.

Beyond reviewing the propriety of the Board's remedy, the Board's conclusions regarding the liability issues (*e.g.*, that RTP committed ULPs in the form of direct dealing, unlawfully withdrawing recognition, and "coercing" an employee during an interview) should be reviewed because, as described below, the Board applied procedures that do not comport with the normal course of judicial proceedings, and

principles that cannot stand under the Act or its interpretation by this Court.

As this Court has observed, in withdrawal of recognition cases, the Board is not entitled to deference if the Board makes policy under the guise of fact finding. In other words, when the Board's application of a statutory interpretation (which would otherwise be entitled to deference) frustrates meaningful judicial review by "subtly and obliquely" revising the Board's previously stated test to impose more stringent standards in certain factual contexts, deference is not appropriate. *Allentown Mack, supra.* In *Allentown Mack*, the employer asserted that it had a good faith belief that a majority of the employees no longer supported the union and polled the employees regarding union support. 118 S.Ct. at 821. Following administrative proceedings, the Board stated that the employer was required to demonstrate an "objectively reasonable doubt" as to the employees' support for the union before withdrawing recognition. *Id.* The Board went on to find that the employer could not have demonstrated the requisite doubt despite the results of a poll demonstrating that a majority of employees no longer wanted the union to represent them. *Id.*

In denying enforcement of the Board's Order, this Court held that although the "objectively reasonable doubt" test was a permissible interpretation of the Act, the Board's application of that standard "covertly transform[ed]" this test into a "working assumption" that all of the employees supported the union "until proved otherwise" – a presumption that could not stand under the Act. 118 S.Ct. at 825. In other words, one lesson of *Allentown Mack* is that the Board cannot divorce the rule announced from the rule applied, especially on the issue of causation:

> A series of cases that exemplify in practice [the Board's] divorcing of the rule announced from the rule

> applied . . . also frustrates judicial review. If revision of the Board's standard of proof can be achieved this subtly and obliquely, it becomes a much more complicated enterprise for a court of appeals to determine whether substantial evidence supports the conclusion that the required standard has or has not been met. It also becomes difficult for this Court to know, once certiorari is sought, whether the case involves the generally applicable issue of the Board's adoption of an unusually high standard of proof, or rather just the issue of an allegedly mistaken evidentiary judgment in the particular case. An agency should not be able to impede judicial review, and indeed even political oversight, by disguising its policymaking as fact finding.

Id. at 827-28 (emphasis added).

Here, the Board's analysis bears little resemblance to its previously-announced *Allentown Mack* "objectively reasonable doubt" standard. Under that standard, although an incumbent union enjoys a presumption of majority status, an employer could rebut that presumption and withdraw recognition in either of two ways: (1) by demonstrating that, on the date recognition was withdrawn, the union did not actually enjoy majority support; or (2) by presenting evidence of a sufficient objective basis for a reasonable doubt of the union's majority status. *Pirelli Cable Corp. v. NLRB*, 141 F.3d 503, 520 (4th Cir. 1998); *Hartz Mountain Corp.*, 295 NLRB 418, 426 (1989).

Not surprisingly, the Board once again recently changed this standard for evaluating when an employer may lawfully withdraw recognition. In March of 2001, four months *before* the Board issued its Decision in this case, the Board in *Levitz Furniture Company*, 333 NLRB No. 105 (2001) overruled a line of cases holding that an employer

could withdraw recognition on the basis of uncertainty regarding the Union's majority status and announced that:

> We have concluded that there are compelling legal and policy reasons why employers should not be allowed to withdraw recognition merely because they harbor uncertainty or even disbelief concerning unions' majority status. We therefore hold that an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees . . . Under our new standard, an employer can defeat a post-withdrawal refusal to bargain allegation if it shows, as a defense, the union's actual loss of majority status.

Id. at p. 2 (emphasis added). *Levitz Furniture* plainly demonstrates the Board's distaste for any employer that withdraws recognition. The legitimacy of the Board's decision in the instant case (which purported to apply a standard that the Board obviously no longer believed in) must be viewed with skepticism in light of the Board's new rule that makes it even more difficult to withdraw recognition. It certainly appears that, in the present case, the Board applied its *Levitz Furniture* anti-withdrawal policy under the guise of "fact finding" on the objectively reasonable doubt standard – precisely the "subtle and oblique" conduct proscribed by *Allentown Mack, supra.*

Two facts buttress this conclusion. First, the record contains numerous items of evidence predating RTP's alleged ULPs that confirmed pre-existing employee disaffection with the UAW, as itemized in RTP's Statement of the Case, above. Under *Allentown Mack*, all that is required is an "uncertainty" -- not proof by a preponderance of the evidence -- that the union lacks majority status. As such, these factors alone justify a good faith doubt of majority status as a matter of law.

See, e.g., NLRB v. Albany Steel, Inc., 17 F.3d 564 (2d Cir. 1994) (drop in number of dues payors, lack of union activity, expression of employee dissatisfaction all legitimate factors potentially suggesting lack of majority support).

However, when presented with this evidence, the Board cast it aside as "irrelevant." (Appx. B-13). There is no way to rationally reach the conclusion that an employer's independent evidence of pre-existing employee disaffection with the union is "irrelevant" in a withdrawal of recognition case without contravening *Allentown Mack*. RTP respectfully submits that the Board reached its conclusions by silently rejecting *Allentown Mack* in order to apply its *Levitz Furniture* standard to find an unfair labor practice in this case.

Another example of the Board's suspect jurisprudence is its conclusion that RTP's conduct in January and February of 1998 was the sole cause of employee disaffection with the union, resulting in the Petition to oust the UAW. (*See* Appx. B-9 to B-13). Indeed, before the Eighth Circuit, the Board took the position that "the Board need not base a finding of taint on direct evidence of a causal link between the employer's unfair labor practices and the union's loss of its majority." (Board's Brief to the Eighth Circuit at 36). In other words, the Board takes the position that it needs no evidence of an actual causal connection to conclude that an alleged ULP tainted the Petition. It takes little imagination to understand why the Board reached that conclusion -- because no such causal evidence exists in this case. The Board failed to present any testimony showing RTP's letters actually caused employee disaffection and the resulting Petition.

As a threshold issue, the Board's current position appears to conflict with the Board's previous decisions wherein the Board recognized that "specific proof" of a causal connection is required. *Lee Lumber and Building*

Material Corp., 322 NLRB 175, 177 (1996) (emphasis added), overruled in part by 177 F.3d 1454 (D.C. Cir. 1997).

If it had applied this standard on the causal connection issue, the Board would not have had to look far to find "untainted" evidence of employee dissatisfaction with the UAW. For example, bargaining unit members were unhappy with the conduct of certain members of the Union leadership (T. 403), disaffected with the Union because of how the Union handled "supervisors" that had been part of the bargaining unit (T. 404, 469), unhappy with the UAW for seizing funds that the local membership had collected (T. 411), and unhappy with the fact that the UAW brought a grievance that, if successful, would have necessarily resulted in a number of bargaining unit members losing overtime pay (T. 491).

Moreover, to the apparent dismay of its members, the Union undisputedly mishandled the collective bargaining process. (Appx. B-44, 45) ("[RTP] cannot be saddled with the responsibility for the fact that negotiations were not completed by the end of 1997, or the predicament in which the Union found itself as a result"). None of this dissatisfaction is connected to the three letters.

The Board's conclusion also ignores the fact that the parties were so concerned with the question of majority status that they agreed to an election, *and all of this uncertainty arose prior to RTP's three letters*. As such, the Board had no rational basis to conclude that RTP's three letters *actually* tainted the Petition.

In any event, regardless of how the Board characterizes the three letters, its subjective interpretation of the "impression" of the letters cannot stand in the face of the free speech protections of Section 8(c) of the Act. *See* 29 U.S.C. § 158(c). Communicating RTP's perspective to

employees about the implementation of changes that the Union itself had demanded is not unlawful. Instead, the letters were simple communications to the workforce regarding the status of changes at issue – all of which is protected free speech under Section 8(c) of the Act. *See, e.g.*, *Salvation Army Williams Memorial Residence*, 293 NLRB 944 (1989) (employer's statement that union belonged to Mafia was free speech). Nothing in the Act makes "blaming the UAW" a statutory violation, especially where the UAW deserved to be blamed for the fiasco resulting from the UAW's revocation of the tentative agreement to hold an election.

A final example of decision making that warrants review is the Board's conclusion that RTP unlawfully "coerced" an employee during a pretrial interview. In *Johnnie's Poultry*, 146 NLRB 770 (1964), *enf'mt denied* 344 F.2d 617 (8th Cir. 1965), the Board "established safeguards designed to minimize the course of impact of an investigatory interview by an employer, by allowing the employer to investigate the facts concerning issues raised in the Complaint and the preparation of its defense." *Jackson Rock Springs Stages, Inc.* 324 NLRB 588 (1997). The purpose of these "safeguards" is to prevent employee intimidation and coercion. *See Johnnie's Poultry, Jackson Rock, supra.*

In this case, the Board concluded that RTP violated the Act during an interview with former union officer Ken Erickson that RTP had arranged in order to prepare to defend against the Board's allegations at the trial of this case. It is undisputed that, prior to the start of the interview, RTP provided Erickson with a written notice stating as follows:

> THE SOLE PURPOSE OF THIS INTERVIEW IS TO INVESTIGATE THE FACTS CONCERNING THE UNION'S ALLEGATION THAT THE COMPANY HAS COMMITTED CERTAIN UNFAIR LABOR

PRACTICES IN ORDER TO PREPARE ITS DEFENSE. THESE ALLEGATIONS WERE RAISED IN A COMPLAINT DATED MAY 21, 1998.

YOUR PARTICIPATION IN THIS INTERVIEW IS COMPLETELY VOLUNTARY. NO DISCRIMINATION WILL RESULT IF YOU CHOOSE NOT TO PARTICIPATE AND NO REWARD WILL RESULT IF YOU CHOOSE TO PARTICIPATE.

Erickson's testimony confirmed that the meeting was "totally voluntary," that Erickson could "leave or stay as [he] saw fit," and he never felt "any coercion" to answer questions. (T. 626, 628). RTP's representatives then asked Erickson if he would prefer if members of management that intended to attend the meeting left, and Erickson assured them that it "didn't matter" either way to him. (T. 628). Also revealing is Erickson's testimony that no interrogation into his subjective state of mind occurred at all. (T. 608). Given the witness' own testimony and the written notifications, there is no rational way for the Board to conclude that RTP violated the Act. This case should be reviewed because the Board should not be allowed to use the threat of a *Johnnie's Poultry* ULP charge to keep this Company or any other from taking steps necessary to defend itself against charges the Board brought in the first place.

The deference normally afforded to the Board is not unlimited. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 122 S.Ct. 1275 (2002). When the Board disregards relevant evidence in wholesale fashion, applies a moving-target approach when interpreting the Act, and makes policy under the guise of fact-finding, it forfeits such deference. Certiorari should be granted.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks the Court to grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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TABLE OF APPENDICES

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Appendix B — Decision and Order of the National Labor Relations Board, dated July 11, 2001

Appendix C — Order of the National Labor Relations Board denying RTP's Motion to Reopen the Record to Present Evidence of Changed Circumstances, dated March 25, 2002

Appendix D — Relevant excerpts of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 01-3073

National Labor Relations Board,	*	
	*	
Petitioner,	*	
	*	
International Union, United Automobile, Aerospace &	*	
	*	Petition for
	*	Enforcement
Agricultural Implement Workers of America, AFL-CIO-CLC,	*	of an Order of the
	*	National Labor
	*	Relations Board.
Intervenor on Appeal,	*	
	*	
v.	*	
	*	
Miller Waste Mills, doing business as RTP Company, Inc.,	*	
	*	
	*	
Respondent.	*	

Submitted: October 7, 2002
Filed: January 10, 2003

Before HANSEN, Chief Judge, and HEANEY and MORRIS SHEPPARD ARNOLD, Circuit Judges.

HEANEY, Circuit Judge.

The National Labor Relations Board petitions this court to enforce its order against Miller Waste Mills, Inc. We agree with the Board that the company violated § 8(a)(1) and § 8(a)(5) and (1) of the National Labor Relations Act and enforce the Board's order in these respects. We also hold that the Board did not abuse its discretion in directing the company to recognize and bargain with the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) or in denying Miller Waste's request to reopen the record.

Miller Waste manufactures thermal plastic molding compound at its facility in Winona, Minnesota. In 1984, the employees voted for representation by the Winona Free Union (WFU), an independent labor organization formed by the employees. Thereafter, the WFU and Miller Waste entered into several collective bargaining agreements, with the last agreement set to expire on December 31, 1996. In February 1996, the employees of the bargaining unit voted by secret ballot at a union meeting to affiliate with the UAW. After the company refused to recognize and bargain with the UAW, the Board's general counsel issued a complaint against the company. Thereafter, the Board found that the UAW became the bargaining representative of Miller Waste's production and maintenance employees in February 1996 and ordered the company to recognize and bargain with the union. Miller Waste complied with the Board's order.

In the spring of 1997, the parties exchanged proposals for a new contract at meetings to be held in August of that year. The UAW proposed that Miller Waste grant annual wage increases, improve health insurance benefits, and decrease the employees' cost of health insurance. The company responded by proposing a wage freeze for 1997 and 1998, and expressed a willingness to discuss changes in health insurance benefits as long as the employees paid any increased costs.

In December 1997, Miller Waste notified the UAW that it would not reach a bargaining agreement unless the union could show that a majority of the unit members currently supported the union. At the same meeting, the parties discussed wages and changes in health insurance benefits. The union told the company that it could proceed with a wage increase without having to worry about an unfair labor practice charge and that it could change health insurance benefits as long as the changes did not offset a wage increase and leave the employees with a net loss in compensation. Shortly thereafter, the union notified Miller Waste that it would not agree to hold a representation election. On January 2, 1998, the company sent a letter to each unit employee decrying the lack of progress in negotiations, asking again for a Board election to determine whether the employees still wanted the UAW to represent them, and stating:

> [T]he [union] stated [on December 11 that] they would allow [the company] to give the employees an increase in pay and to decrease insurance costs but no specifics were discussed. You will recall when [the company] raised wages last year, the UAW filed an unfair labor practice charge against us.
>
> We appreciate the need for increased wages and decreased insurance costs, but we cannot handle these things piecemeal. Wages and insurance are only part of the complete economic package, which also includes vacations, holidays, overtime and other issues which we've always dealt with at the same time. We also find it difficult to trust the UAW after they pulled the rug out from under us by denying an election. These and other issues must all be resolved simultaneously.

> This is a sad occasion for all of us as this marks the first time in [the company]'s long history we won't be giving you a wage increase at this time. Please understand this is not the way we do business. We are continually exploring ways to ensure that neither our employees nor [the company] are damaged any further by this fiasco.

(J.A. at 173.)

On January 12, 1998, the UAW sent Miller Waste notice that the union would file a charge if the company did not retract the January 2 letter quoted above and give the employees a wage increase as the company had always done in the past. On January 15, Miller Waste received a petition signed by approximately fifty percent of the employees in the bargaining unit. The petition asked the company to grant employees a fair and decent wage increase and better insurance. In response, Miller Waste directed a letter to "our loyal employees," informing them that the company was going to grant a wage increase of 51¢ an hour (the largest pay increase ever granted by the company), and stating that it hoped and believed it could reduce the cost for health insurance. This letter was followed shortly by another letter from Miller Waste to the employees, this time stating that the company was reducing the employee contribution for health insurance with improved benefits. Miller Waste did not consult with the union prior to implementing these unilateral wage and insurance changes.

On February 4, an employee in the bargaining unit informed the company that 125 employees signed a petition stating they did not want the UAW to represent them. Thereafter, a lawyer for the employees sent Miller Waste a letter dated February 22, stating that the law firm represented a number of company employees who have "advised us that a clear majority" of company employees have signed a petition

regarding union affiliation. (J.A. at 183.) Enclosed in the letter was a blind copy of the petition that stated, "We no longer want to be affiliated with the U.A.W., and I do not want the U.A.W. to represent me." (Id. at 184.)

On February 26, at scheduled negotiations between Miller Waste and UAW, the company's chief negotiator showed the union the letter from the employees and a copy of the petition and told the UAW's negotiator that based on this document, Miller Waste was no longer in any position to bargain with the union. On the same day, the company sent a letter to its employees stating that as a result of the letter and the petition, it was no longer going to meet with the UAW. The letter thanked the employees for supporting the company and stated that the company would "continue to operate as it had over the past months." (Id. at 185.) Thereafter, Miller Waste refused to allow the UAW to participate in the company's grievance process or permit a union officer to take time off for union business.

Soon after Miller Waste stopped negotiating with the UAW, the company announced a change in its attendance program, and informed employees that effective June 1, they could begin using the same health plan as used by the non-unit employees, a change that would result in better benefits and lower employee contributions. On June 1, the company purchased life insurance for unit employees and increased its weekly payment for employees on disability.

In preparation for the hearing on the UAW's unfair labor practice charges, the company issued a subpoena duces tecum to an employee on the union's negotiating committee and who served as the union vice president until January 1998. In response to that subpoena, the employee supplied his notes of the union meeting. These notes identified the employees who

attended the meeting and indicated what transpired during the meeting.

On the basis of the above facts, the Board unanimously agreed that from the date the employees voted to affiliate with the UAW, Miller Waste worked to undermine and affect limited bargaining, and engaged in a series of unfair labor practices which culminated in the company's withdrawal of recognition of the UAW. The Board also found that Miller Waste's letters reasonably led the employees to blame the union for their failure to receive the customary annual wage increase. Most importantly, the Board found that Miller Waste engaged in direct dealing with the employees by, without union involvement, granting the largest raise in the company's history and telling the employees that it would improve health care benefits in the near future. Finally, the Board found that there was a causal relationship between Miller Waste's unfair labor practices and the subsequent employee petition claiming dissatisfaction with the union, upon which the company based its withdrawal of recognition, and that the direct dealing tainted the petition because it undermined the union and indicated to the employees that the company had the employees' best interests at heart. As a result, Miller Waste acted unlawfully by withdrawing recognition of the union based on the petition.

More specifically, the Board found that Miller Waste's January 2, 1998 letter and its pretrial interview of the employee violated § 8(a)(1) of the Act. The Board also found that the company's January 16 and February 13, 1998 letters informing the employees of wage and benefit changes constituted direct dealings with the employees in violation of § 8(a)(5) and (1) of the Act. The Board also found that Miller Waste violated the same sections of the Act by withdrawing recognition of the UAW and thereafter implementing changes in the terms and conditions of employment; refusing to

comply with the union's information request; refusing to permit employees to take time off for the union grievance process; and refusing to allow the union to participate in the union grievance process. The Board's order not only requires Miller Waste to cease and desist from the unfair labor practices found, but affirmatively directs the company to recognize the UAW as exclusive representative of the company's production and maintenance employees at the Winona plant and bargain with the UAW upon the union's request, to comply with the union information request, to allow union officials to conduct union business during scheduled work time, to participate in the grievance process, and to post appropriate notices to the employees. The Board also denied the company's request to reopen the record.

Discussion

The Board's findings of fact are to be affirmed if supported by substantial evidence on the record. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951). In this case, we are in full agreement with the Board's findings. We find particularly egregious Miller Waste's failure to bargain with the union in good faith after it had been certified to represent the employees. Instead, Miller Waste engaged in a series of unfair labor practices designed to undermine union support, the most important of which was dealing with the employees directly and improving their wages and benefits while completely circumventing the union's authority.

The Board took issue with the following letters from Miller Waste to its employees: (1) the letter of January 2, because it blamed the union for preventing a wage increase; (2) the letter of January 16 granting a wage increase, because it bypassed the union and dealt directly with unit employees; and (3) the letter of February 13 notifying the employees of a reduction in their health insurance costs, because it also bypassed the union and dealt directly with unit employees.

The company argues that the letters did not unlawfully blame the union or constitute direct dealings with the employees. The record as a whole, however, indicates that Miller Waste made it quite clear to the employees that it would grant them wage and benefit increases if they bypassed the union. It comes as no surprise that when the employees accepted the company's invitation, they were rewarded for their efforts. Such conduct is a clear violation of the Act, as the Board correctly found.

Further, the Board did not abuse its discretion in directing Miller Waste to bargain with the UAW. Congress expressly delegated to the Board the authority to order appropriate relief for unfair labor practices. Thus, the Board's remedies are reviewed for an abuse of its broad discretion in its field of expertise. *NLRB v. Beverly Health & Rehabilitation Servs., Inc.*, 187 F.3d 769, 772 (8th Cir. 1999); *NLRB v. Drapery Mfg. Co.*, 425 F.2d 1026, 1029 (8th Cir. 1970). Our circuit's decisions are consistent with *NLRB v. P. Lorillard Co.*, 314 U.S. 512, 512-13 (1942), in which the Supreme Court stated:

> The Board found that the respondent...had committed an unfair labor practice within the meaning of Section 8(5) of the National Labor Relations Act by refusing to bargain collectively with...the duly selected bargaining representative ....On the Board's petition for enforcement the court below sustained the Board's finding, but expressing the belief that because of lapse of time and changed conditions the Local might no longer represent the majority of employees, modified the Board's order so as to require it to conduct an election to determine whether the Local had lost its majority due to a shift of employees to a rival independent association. The Board had considered the effect of a possible shift in

> membership, . . . [b]ut it had reached the conclusion that in order to effectuate the policies of the Act, [the company] must remedy the effect of its prior unlawful refusal to bargain by bargaining with the union shown to have had a majority on the date of [the company]'s refusal to bargain. This was for the Board to determine, and the court below was in error in modifying the Board's order in that respect.

Lastly, the Board did not abuse its discretion when it denied the company's request to reopen the record. Not only did the company fail to meet the requirements of the Board's rules and regulations that govern the reopening of the record, but the Board found the company failed to promptly submit the new evidence or explain why it had not done so.

We have considered the other issues raised by Miller Waste and find them without merit. Thus, we enforce the Board's order.

A true copy. Attest:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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Miller Waste Mills, Inc., d/b/a RTP Company and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW. Case 18-CA-14768

July 11, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On September 22, 1998, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, each filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm

[1] The judge found, citing *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), enf. denied on other grounds 320 F.2d 615 (3d Cir.1963), that the Respondent did not violate the Act by ceasing to deduct union dues from employees' paychecks. There are no exceptions to this finding.

The Respondent challenges the validity of the complaint, issued on May 21, 1998, while Frederick Feinstein was Acting General Counsel, on the ground that Feinstein's appointment was illegal. On Oct. 22, 1998, former

the judge's rulings, findings, and conclusions[2] as modified and more fully explained below, and to adopt the recommended Order as modified and set forth in full below.[3]

The judge found, inter alia, that the Respondent unlawfully withdrew recognition from the Union. For the reasons explained below, we agree with the judge.

Background

The Respondent manufactures thermo plastic compound at its facility in Winona, Minnesota. Local 2340, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW (the Union) became the collective-bargaining representative of the Respondent's production and maintenance employees pursuant to an affiliation vote held on February 11, 1996.[4] On February 20,

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President Clinton, pursuant to his constitutional power to make recess appointments, appointed Feinstein General Counsel. In that capacity, on Nov. 5, 1998, Feinstein expressly ratified the Regional Director's issuance of the complaint in this case. In light of that action, the Respondent's argument is moot; *See Federal Election Commission v. Legi Tech, Inc.*, 75 F3d 704 (D.C. Cir. 1996), and *Doolin Savings Bank v. Office of Thrift Supervision*, 129 F3d 203, 212-214 (D.C. Cir. 1998).

[2] Conclusion of Law 5 is modified to reflect that the Respondent's conduct described therein also violated Sec. 8(a)(5). Conclusion of Law 6 is modified to reflect that the Respondent's conduct described therein violated Sec. 8(a)(5) and (1).

[3] We find it unnecessary to pass on the judge's dismissal of the 8(a)(5) surface bargaining allegation. The finding of such an additional violation would be cumulative and would not affect the remedy.

We shall modify the recommended Order to reflect the additional 8(a)(5) violations we find here, as well as violations the judge found but inadvertently omitted from the recommended Order.

[4] The Winona Free Union had previously represented the unit employees.

1997, the Board ordered the Respondent to recognize and bargain with the Union.[5]

The parties commenced bargaining on August 26, 1997. They met seven times between that date and February 26, 1998, at which time the Respondent withdrew recognition from the Union.

At the August 26, 1997 session, the Union proposed, inter alia, that the Respondent grant annual wage increases, improve health insurance benefits, and decrease employee costs for health insurance. The Respondent countered with a proposed wage freeze for 1997 and 1998, and agreed to discuss changes in health insurance benefits with the understanding that any increased costs would be paid by employees.

The Respondent's practice was to grant annual wage increases in December or January of each year. At the December 11, 1997 meeting, the Union stated that it would not oppose a wage increase for unit employees. The Union stated it would not file an unfair labor practice charge if the Respondent granted employees the annual wage increase that the Respondent had historically provided around the beginning of each year. The Union again requested that the Respondent improve health insurance benefits. The Respondent did not commit to a wage increase, but did agree that if changes were made to health insurance benefits, there would be no "net loss" to employees.

On January 2, 1998,[6] the Respondent sent a letter to unit employees, stating, in pertinent part

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[5] *RTP Co.*, 323 NLRB 15.

[6] All subsequent data are in 1998 unless indicated otherwise.

As you know, negotiations with the UAW have been ongoing for a long time but we are still a long way from settlement. A Federal mediator has been involved in the last three meetings but there has been little progress.

....

During [the] December 11 meeting, the UAW Union Committee stated they would allow RTP to give the employees an increase in pay and to decrease insurance costs. . . . You will recall when RTP raised wages last year, the UAW filed an unfair labor practice charge against us.

....

We appreciate the need for increased wages and decreased insurance costs, but we cannot handle these things piecemeal. Wages and insurance are only part of the complete economic package, which also includes . . . other issues which we've always dealt with at the same time.

....

This is a sad occasion for all of us as this marks the first time in RTP's long history we won't be giving you a wage increase at this time. Please understand this is not the way we do business. We are continually exploring ways to ensure that neither our employees nor RTP are damaged any further by this fiasco.

On January 12, the Union reminded the Respondent of its understanding that "the raise would be given if there were no unfair labor practice charges filed." The Union stated that it would file a charge if the Respondent did not retract its January 2 letter and give the employees a wage increase "as [the Respondent has] always done in the past."

On January 15, the Respondent received an employee petition requesting that the Respondent "grant us a fair and decent wage increase and better insurance for 1998." In a cover letter, the employees who signed the petition stated that the petition was not connected with the Union: "It is simply a request from your loyal employees."

On January 16, the Respondent wrote to its "loyal employees" that, in response to their petition and "[r]egardless of the UAW and the NLRB and all of those problems, we are going to do what you asked," and that it was granting them a 51-cent-per-hour wage increase effective January 12.[7] In addition, the Respondent stated that it hoped it could reduce the cost for health insurance, and would get back to employees "shortly."

As promised, the Respondent did get back to its employees. On February 13, the Respondent told employees that the Respondent was reducing their insurance costs. The Respondent also reminded employees that it had just increased their wages.

On February 25, the Respondent received notice that a majority of employees had signed a petition stating that they no longer wanted to be represented by the Union. At the February 26 negotiating session, the Respondent informed the Union that, based on the employee petition, the Respondent would no longer recognize and bargain with the Union. After withdrawing recognition from the Union, the Respondent refused to comply with the Union's information requests, refused to allow the Union to participate in the grievance process or to allow an employee to take time off for union

[7] This was the largest across-the-board wage increase the Respondent had granted to employees in at least 38 years.

business, and engaged in unilateral dealings with unit employees.[8]

Discussion

1. We agree with the judge that the Respondent's January 2 letter to employees misrepresented the Union's bargaining positions and blamed the Union for preventing the employees from receiving their customary annual wage increase. As the judge observed, "It is not surprising that employees would become alienated from a Union which they believed had prevented a wage increase. Thus, as the judge found, the letter would tend to interfere with the exercise of Section 7 rights in violation of Section 8(a)(1) of the Act.[9]

We also find, as explained below, that the Respondent's January 16 and February 13 letters informing employees of improved wages and benefits constituted direct dealing with employees in violation of Section 8(a)(5) of the Act.

The Respondent's January 16 letter informed employees that the Respondent was going to "do what you asked" and grant a wage increase "[r]egardless of" the Union. The Respondent's February 13 letter announced a reduction in employee health insurance premium costs. It is undisputed that the Respondent did not consult with the Union before sending the letters to its employees in response to the January 15 "loyal employee" petition. The Respondent's conduct in bypassing the Union when it sent the January 16 and February 13 letters regarding working conditions constitutes direct

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[8] The Respondent informed its employees that it was reviewing its medical, 401(k), vacation, and other benefits, implemented a superior attendance incentive program; and told employees of the availability of health insurance coverage through a new insurance carrier.

[9] *Hillhaven Rehabilitation Center*, 325 NLRB 202, 220 (1997), enf. in relevant part mem.178 F.2d 1296 (6th Cir.1999).

dealing with employees in violation of Section 8(a)(5) and (1) of the Act.[10]

We agree with the judge's finding that the Union waived its right to bargain over granting the wage increase and reducing employee insurance premiums. Nevertheless, the Respondent had an obligation to continue dealing with its employees through their collective-bargaining representative. As the Board explained in *Allied-Signal*, 307 NLRB 752, 754 (1992), a finding that a union waived its bargaining rights so as to permit unilateral action by an employer cannot be equated with "a finding that the Union also agreed that the Respondent could deal with employees as if the Respondent's work force had no bargaining representative. Direct dealing with employees goes beyond mere unilateral action." Here, there is no evidence that the Union waived its distinct right to object to direct dealing by the Respondent.

In sum, the Respondent's conduct in ignoring the Union and dealing directly with employees "is inconsistent with the [Respondent]'s statutory bargaining obligation, tends to undermine the status of the bargaining agent, and interferes with employees' Section 7 rights."[11]

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[10] *See Basic Metal do Salvage Co.*, 322 NLRB 462, 465-466 (1996); *Detroit Edison Co.*, 310 NLRB 564, 565 (1993); and *Bueter Bakery Corp.*, 223 NLRB 888, 890 (1976). *See also Modern Merchandising*, 284 NLRB 1377, 1379 (1987), where the Board found that the employer engaged in unlawful direct dealing when it sent a letter to employees regarding workplace improvements.

[11] *Royal Motor Sales*, 329 NLRB No. 71, slip op. at 2 (1999), enfd. 2001 WL 59043 (D.C. Cir. 2001), citing *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-684 (1944).

2. Unit employees acted quickly in response to the Respondent's direct dealing: By February 25, a majority of employees had signed a petition stating that they no longer wished the Union to represent them. The Respondent reacted quickly in response to the petition: On February 26, the Respondent informed the Union that it would no longer recognize and bargain with it.

The judge found that the Respondent was not entitled to withdraw recognition and cease bargaining with the Union. In adopting the judge's finding that the Respondent violated Section 8(a)(5) by withdrawing recognition from the Union, we rely solely or the fact that the petition on which the Respondent relies was tainted by the Respondent's unfair labor practices.

The Board has long held that an employer may not withdraw recognition from a union while there are unremedied unfair labor practices tending to cause employees to become disaffected from the union. *Olson Bodies*, 206 NLRB 779, 780 (1973). As one court has stated, a "company may not avoid the duty to bargain by a loss of majority status caused by its own unfair labor practices." *NLRB v. Williams Enterprises*, 50 F.3d 1280, 1288 (4th Cir.1995).[12]

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[12] On March 29, the Board issued *Levitz Furniture Co. of the Pacific*, 333 NLRB No. 105, slip op. at l, in which it "reconsider[ed] whether, and under what circumstances, an employer may lawfully withdraw recognition unilaterally from an incumbent union." *Levitz*, however, has no bearing on our decision today because *Levitz* expressly limited its analysis "to cases where there have been no unfair labor practices committed that tend to undermine employees' support for unions." *Id.* at fn. 1. In addition, the Board held in *Levitz* that its analysis and conclusions in that case would only be applied prospectively. *Id.*, slip op. at 12.

The question, then, is one of causation. In cases involving unfair labor practices other than a general refusal to bargain, the Board has identified several factors as relevant to determining whether a causal relationship exists between the unremedied unfair labor practices and the subsequent expression of employee disaffection with an incumbent union. These factors include the following: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violations, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violations to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

If a causal relationship is found between unfair labor practices and the loss of employee support for a union, the evidence on which an employer has based its withdrawal of recognition is said to be "tainted," and the withdrawal is unlawful. An employer cannot rely on an expression of disaffection by its employees which is attributable to its own unfair labor practices directed at undermining support for the union.[13]

As set forth above, the Respondent committed the following unfair labor practices:

- On January 2, blaming the Union for preventing a wage increase;

- On January 16, bypassing the Union and dealing directly with unit employees by its letter granting employees a wage increase;

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[13] *Hearst Corp.*, 281 NLRB 764 (1986), enfd. 837 F.2d 1088 (4th Cir.1988).

- On February 13, bypassing the Union and dealing directly with unit employees by its letter notifying employees of a reduction in their health insurance costs.

Based on the *Master Slack* principles, we find a strong causal connection between these unfair labor practices and the employee petition on which the Respondent relied in withdrawing recognition from the Union.

With respect to the first *Master Slack* factor (lapse of time), the unfair labor practices occurred between January 2 and February 13. The antiunion petition was submitted to the Respondent within 6 weeks of the January 16 direct dealing letter and within 2 weeks of the February 13 direct dealing letter. Thus, the record shows a close temporal proximity between the Respondent's unfair labor practices and its withdrawal of recognition.

With respect to the second *Master Slack* factor (the nature of the conduct), we find that the Respondent's unfair labor practices, which were disseminated throughout the bargaining unit, would reasonably tend to have lasting effects on employees. As one court has explained, an employer's "go[ing] over the head of the [Union] to deal individually with the employees ... tend[s] inevitably to weaken the authority of the [Union] and its ability to represent the employees in dealing with the Company." *Utica-Observer Dispatch v. NLRB*, 229 F.2d 575, 577 (2d Cir. 1956). The Respondent's unfair labor practices "convey[ed] to employees the notion that they would receive more . . without union representation. Such conduct improperly affects [the] bargaining relationship." *Detroit Edison, supra*, 310 NLRB at 566.

We now turn to the final two *Master Slack* factors, which focus on the effect of the conduct on protected employee activities. As the judge stated, the Respondent's accusation that the Union prevented a wage increase would tend to alienate employees from the Union. Further, direct dealing, by its very nature, would tend to undermine employee confidence in the effectiveness of their collective-bargaining representative by suggesting that the Respondent alone was the source of wage and benefit improvements. Taken together, the Respondent's conduct in accusing the Union of preventing a wage increase, followed immediately by the Respondent's direct dealing regarding wages and other benefits "regardless of the Union," is of a character that reasonably tends to have a negative effect on union membership.

For all these reasons, we find a causal relationship between the alleged unfair labor practices and the antiunion petition underlying the Respondent's withdrawal of recognition. Thus, the unfair labor practices tainted the employee petition and the Respondent was not entitled to rely on the petition as a valid expression of employee sentiment.

In its exceptions, the Respondent asserts that it did not rely solely on the employee petition when it withdrew recognition from the Union, and it cites to a number of other factors of which it "was already aware" on February 25. These additional factors are listed as items "a" through "k" in the section of the judge's decision entitled, "Respondent not entitled to withdraw recognition from the Union on February 26,1998." According to the Respondent, many of these factors "predated any alleged unfair labor practices" and constituted valid grounds for withdrawing recognition from the Union. For the reasons set forth below, we find no merit in the Respondent's argument.

In analyzing the adequacy of an employer's defense to a withdrawal of recognition allegation, the Board will only examine factors actually "relied on" by the employer. *Holiday Inn of Dayton*, 212 NLRB 553 fn. 1, 556 (1974), enfd. 525 F.2d 476 (6th Cir.1975). Conduct of which the employer may have been aware, but on which the employer "did not base" its decision to withdraw recognition from the Union, is of "no legal significance." *Id. See also Orion Corp.*, 210 NLRB 633, 634 (1974) (Board will only examine those factors on which the withdrawal decision was based), enfd. 515 F.2d 81 (7th Cir. 1975).

Here, we find, contrary to the Respondent's contention, that the February 25 employee petition was the true cause of the Respondent's decision to withdraw recognition from the Union. The record shows that, on February 25, an attorney representing some of the Respondent's employees wrote a letter to the Respondent stating that "a clear majority of the [Respondent's] employees . . . has signed a petition" declaring that they no longer wished the Union to represent them. At the February 26 negotiating session, the Respondent's counsel, Ed Bohrer, showed the letter and blank copy of the petition to the Union and stated that "based upon this document [the petition], we [the Respondent] were no longer in any position to bargain with the union." Bohrer advised the Union that the Respondent was withdrawing from bargaining "on the basis of this letter and petition."

It is clear that the employee petition prompted the Respondent's withdrawal of recognition from the Union. The Respondent did not withdraw recognition because of "other factors" of which it was aware. Instead, as the judge stated, "the Respondent did not feel confident withdrawing recognition from the Union until it had confirmation regarding the withdrawal petition."

The Respondent's "other factors" are irrelevant because the Respondent did not rely on them in withdrawing recognition.[14] Inasmuch as the record shows that none of the "other factors" played any part whatsoever in the Respondent's decision, we find that they have no "legal significance." *Holiday Inn of Dayton, supra.*

We find that the Respondent relied solely on the February 25 employee petition as the basis for its decision to withdraw recognition from the Union. We also find that this petition was tainted by the Respondent's unfair labor practices. Therefore, we conclude that by withdrawing recognition from the Union on February 26, and by refusing to bargain with it, the Respondent violated Section 8(a)(5) and (1) of the Act.[15]

3. The Respondent excepts to the judge's finding that it violated Section 8(a)(2) of the Act by paying Attorney Michael Bernantz for legal services he provided to employees who opposed the affiliation of the Winona Free Union (WFU) with the Union. We find merit in the Respondent's exceptions and reverse the judge on this issue.

On February 11, 1996, the Respondent's employees, who were then represented by the WFU, voted to affiliate with the Union. The Board found that the affiliation vote was valid. *RTP Co.*, supra, 323 NLRB 15. Bernantz provided legal

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[14] Moreover, even if the Respondent had relied on the "other factors" in withdrawing recognition, we would find that they are insufficient to establish a good-faith reasonable uncertainty of the Union's majority status within the meaning of *Allentown Mack Sales do Service v. NLRB*, 522 U.S. 359 (1998).

[15] We have not analyzed the Respondent's withdrawal of recognition under our recent decision in *Lee Lumber and Building Material Corp.*, 334 NLRB No. 62 (2001), because the instant case was not litigated on the theory that the Respondent had not bargained for a reasonable period of time after the issuance of the bargaining order in *RTP Co., supra.*

services to a group of WFU members opposed to the affiliation. The Respondent paid Bernantz' legal fees.

By its terms, Section 8(a)(2) provides that it is an unfair labor practice for an employer to contribute financial support to "any labor organization." Consequently, before a violation of Section 8(a)(2) can be found, the entity involved must be a statutory "labor organization" Here, the record shows that virtually all of the legal services were rendered after WFU's affiliation with the Union was complete and, accordingly, the alleged "labor organization," i.e., WFU, no longer existed.[16] Id. at 22. Substantial evidence is therefore lacking that the Respondent contributed financial support to a "labor organization" in violation of Section 8(a)(2), and we shall dismiss this allegation.[17]

4. We agree with the judge, for the reasons fully set forth in *Caterair International*, 322 NLRB 64 (1996), that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful withdrawal of recognition from the Union. We adhere to the view, reaffirmed by the Board in that case, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-

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[16] An itemized statement from Bernantz is in the record. The statement shows that legal services totaling 1600 billable minutes were rendered between February 1, 1996, and April 3, 1997. Of that total, only a de minimis amount (45 minutes or less than 3 percent) represented services rendered before the affiliation vote on February 11, 1996.

[17] Although the Respondent's payments may have constituted an independent violation of Sec. 8(a)(1), no such unfair labor practice was alleged in the complaint. While certain payments by an employer to his employees or to a representative of his employees are also unlawful under Sec. 302 of the Taft-Hartley Act, 29 U.S.C. § 186, the Board does not have jurisdiction to enforce this provision.

bargaining representative of an appropriate unit of employees." *Id.* at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. *See, e.g., Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In the *Vincent* case, the court-summarized the court's law as requiring that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' §7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." *Id.* at 738.

Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the employer's withdrawal of recognition. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation.

Moreover, employees have not yet had an opportunity to assess for themselves, without any undue influence from the Respondent, the Union's effectiveness as collective-bargaining representative. The Respondent began protesting the Union's representative status immediately after the February 11, 1996 affiliation election. On February 20, 1997, the Board ordered the Respondent to recognize and bargain with the Union. Bargaining commenced in late August 1997. After only seven sessions of Board-ordered bargaining for an initial contract, the Respondent, starting on January 2, 1998, acted to influence its employees *away* from union representation by blaming the Union for preventing an employee wage increase and by dealing directly with employees regarding significant terms and conditions of employment. The Respondent's efforts resulted in an employee petition seeking the end of union representation, which the Respondent honored by withdrawing recognition from the Union on February 26, 1998, and dealing directly with employees for another 3 months. In light of these events, it is only by restoring the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time that employees will be able to fairly decide for themselves whether they wish to continue to be represented by the Union or adopt some other arrangement.

(2) The affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured, by the possibility of a decertification petition, to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(3) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy the Respondent's violations because it would permit a decertification petition to be filed before the Respondent had afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement. Such a result would be particularly unfair in circumstances such as those here, where litigation of the Union's charges took several years and the Respondent's unfair labor practice was of a continuing nature and was likely to have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the allegations in this case.

ORDER

The National Labor Relations Board orders that the Respondent, Miller Waste Mills, Inc., d/b/a RTP Company, Winona, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Misrepresenting to employees positions taken by the Union and blaming the Union for the Respondent's failure to improve benefits or give a wage increase.

(b) When preparing for an unfair labor practice proceeding, interrogating employees in the presence of su-

pervisors, and inquiring into union activities and discussions that occurred outside of the presence of management personnel.

(c) Bypassing the Union and dealing directly with unit employees by its letters granting a wage increase and reducing insurance premium costs.

(d) Refusing to provide information relevant and necessary to the Union as the collective-bargaining representative of unit employees.

(e) Withdrawing recognition from, and refusing to bargain with, the Union as the exclusive bargaining representative of the employees in the appropriate bargaining unit described below.

(f) Informing employees that it would no longer authorize them to take time off for union business.

(g) Bypassing the Union and dealing directly with unit employees by informing that that it was reviewing its medical, 401(k), vacation, and other benefits; implementing a superior attendance incentive program; and informing them of the availability of health insurance coverage through a different insurance carrier.

(h) Refusing to allow the Union to participate in the grievance process.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees employed at the Respondent's plant in Winona, Minnesota; excluding office and clerical employees, engineering department employees, draftsperson, plant clerical employees, and all guards and supervisors as defined by the National Labor Relations Act.

(b) Provide the Union with the necessary and relevant bargaining information it requested on February 16, 1998, and thereafter.

(c) Return to the status quo ante and allow union officials to conduct union business during scheduled work - times, and to participate in the grievance process.

(d) On request of the Union, rescind the attendance program implemented on April 15, 1998.

(e) Within 14 days after service by the Region, post at its Winona, Minnesota facility copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be

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[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2, 1998.

(f) Within 14 days after service by the Region, the attached noticed marked "Appendix" shall be read to assemblies of all unit members by either the Respondent's president or senior vice president/chief executive officer.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 11, 2001

Wilma B. Liebman,	Member
John C. Truesdale,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT misrepresent to employees positions taken by the Union and blame the Union for our failure to improve benefits or give a wage increase.

WE WILL NOT, if preparing for hearings in unfair labor practice proceedings, interrogate employees in front of supervisors, or inquire into union activities and discussions that took place out of the presence of company management officials.

WE WILL NOT bypass the Union and deal directly with employees regarding pay, benefits, and other working conditions.

WE WILL NOT refuse to provide information relevant and necessary to the Union as the collective-bargaining representative of unit employees.

WE WILL NOT withdraw recognition from or fail and refuse to bargain in good faith with Local 2340, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, as the exclusive

bargaining representative of our employees in the following appropriate unit:

All production and maintenance employees employed at our plant in Winona, Minnesota; excluding office and clerical employees, engineering department employees, draftsperson, plant clerical employees, and all guards and supervisors as defined by the National Labor Relations Act.

WE WILL NOT tell employees that they may no longer take time off for union business.

WE WILL NOT refuse to allow the Union to participate in the grievance process.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with the Union as the exclusive bargaining representative of our employees in the above-described appropriate unit with respect to wages, hours, and other terms and conditions of employment and WE WILL, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL in a timely fashion furnish the Union with the information requested on February 16, 1998, and thereafter.

WE WILL allow union officials to conduct union business during scheduled worktime.

WE WILL allow the Union to participate in the grievance process.

WE WILL, on request of the Union, rescind the attendance program we implemented on April 15, 1998.

MILLER WASTE MILLS, INC., d/b/a RTP COMPANY

A. Marie Simpson. Esq., for the General Counsel.
Paul J. Zech and Lee A. Lastovich, Esqs. (Felhaber, Larson, Fenlon & Vogt. P.A.). of Minneapolis, Minnesota, for the Respondent.
Robert D. Metcalf, Esq. (Metcalf, Kaspari, Howard, Engdahl & Lazarus, P.A.), of Minneapolis, Minnesota, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Minneapolis, Minnesota, on June 16-19 and July 7 and 8, 1998. The charge was filed March 12, 1998,[1] and the complaint was issued May 21, 1998.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent (Miller Waste or RTP) a corporation, manufactures thermoplastic molding compound at its facility in Winona, Minnesota, where it annually sells and ships goods valued in excess of $50,000 to points outside of Minnesota. It also purchases and receives goods valued in excess of $50,000 from points outside of Minnesota at its Winona facility. Respondent admits and I find that it is an employer engaged in commerce within the meaning of

[1] All dates are in 1997 unless otherwise indicated.

Section 2(2), (6), and (7) of the Act and that the Union, Local 2340 of the UAW, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

On February 20, 1997, the Board found that Respondent had violated Section 8(a)(1) and (5) by refusing to recognize and bargain with the Union, RTP Co., 323 NLRB 15. Following that decision Respondent bargained with UAW Local 2340 from April 1997 until February 26, 1998, when it withdrew recognition of the Union as the exclusive bargaining representative of its employees. The General Counsel alleges that Respondent has violated Section 8(a)(I), (2), and (5) in a number of respects since the Board's decision. These allegations include bad-faith or "surface" bargaining, bypassing the Union and dealing directly with bargaining unit employees and rendering financial assistance to employees opposed to the Union.

Events Leading up to the 1997 NLRB Decision

To put the instant case in context, it is helpful to restate some of Judge William L. Schmidt's factual findings, which were affirmed by the Board. For some period prior to 1984, RTP production and maintenance employees were represented by the International Chemical Workers Union (ICWU). In 1984, a group of employees successfully moved to decertify the ICWU. Afterwards the Board conducted a representation election and certified the Winona Free Union (WFU) formed by these employees as the bargaining representative. The WFU entered into several collective-bargaining agreements with Respondent, the last of which was concluded in February 1994. Judge Schmidt noted that, "the WFU has had an amicable and nonconfrontational

relationship with Respondent, never processing a grievance to arbitration."

In mid-1995, the executive board of the WFU contacted and met with George Klingfus, an international representative of the UAW. At a meeting in December 1995, attended by the six members of the executive board and five or six other bargaining unit members, it was agreed that a vote should be taken at the January 1996 meeting on whether to affiliate with the UAW. On January 22, 1996, the executive board sent a letter to all bargaining unit employees. This letter announced that a special meeting of the Union would be held on Sunday, February 11, 1996, at which a secret ballot election would be taken to determine whether to affiliate with the UAW or remain independent. A copy of the letter was also posted in the workplace. On February 7, the Company sent a letter to all bargaining unit employees. In the letter Miller Waste opposed affiliation and warned that it would challenge the legitimacy of the UAW as a properly certified bargaining agent should affiliation be approved.

Approximately 130 employees attended the February 11 meeting. At the beginning two anti-UAW employees, Robert Kashuba and Ron Swartling, confronted Klingfus and vociferously challenged the legality of the meeting. At the end of the meeting a secret ballot election was conducted and supervised by Reverend John Carrier. Seventy nine employees voted for affiliation and 51 voted against affiliation. Following the election three members of the WFU executive board and Klingfus signed an affiliation agreement.

On March 22, 1996, the UAW issued a charter designating the WFU as UAW Local 2340. Five of the six WFU officers and executive board members assumed the same positions with UAW Local 2340. Respondent refused to recognize the UAW as the bargaining agent of its employees.

Anti-UAW employees, including Robert Kashuba, Scott Holubar, and Jeff Serwa,[2] immediately commenced a campaign to reverse the affiliation of the WFU with the UAW. During this campaign they regularly shared information and, on occasion, sought advice from Charles Wunderlich, a vice president of Respondent, who is principally responsible for its labor relations.

The Board concluded that the UAW has been the bargaining representative of Respondent's employees since February 11, 1996. It noted that a successful affiliation vote does not require a majority vote of the entire bargaining unit membership. The Board found that employees received adequate notice of the vote on affiliation and had an adequate opportunity to discuss and consider the affiliation matter before casting their ballots. It also concluded that Respondent had failed to meet its burden of showing that the affiliation did not preserve continuity between the WFU and Local 2340. Respondent was ordered to recognize and bargain with Local 2340. The remedy portion of the decision concluded that "Local 2340 is entitled to a reasonable period in which to bargain with Respondent free from further interference."

The Commencement of Negotiations Between Respondent
and
the UAW on April 30. 1997

Respondent decided not to appeal the February 1997 Board decision. On April 3, Chuck Wunderlich and Michael Bernatz, attorney for at least several members of the anti-UAW faction within the WFU, discussed the strategy to be followed by the Company and Bernatz' clients with respect to

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[2] Serwa resigned as secretary treasurer of the WFU after its affiliation with the UAW. He is currently a supervisory/management employee at Respondent's Winona plant.

the UAW.[3] Bernatz' notes of that conversation (GC Exh. 41) read in pertinent part:[4]

Option #2
Recognize UAW
Start negotiating in good faith
3-6-10 months- No solution
NLRB will, if new petition
NLRB almost obligated to give petition
There will be a time to get signatures
And demanding election-but not now
"Talking to than in good faith"

Sometime in the early spring of 1997, Respondent's counsel, Edward Bohrer, met with UAW International Representative Thomas Schneider, who was assigned by the Union to conduct contract negotiations. The Union agreed to withdraw two pending unfair labor practice charges and the parties agreed to hold their first meeting on April 30, 1997, in Red Wing, Minnesota This meeting was a cordial "get acquainted" meeting. The Union presented Respondent with an agenda, which included a list of the information it wanted from Miller Waste. The Union informed Respondent that it wanted to survey its membership before starting substantive negotiations and the parties agreed that they would not conduct a letter writing campaign during negotiations without the others' consent.

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[3] Bernatz represented the WFU in contract negotiations with Respondent in 1987, 1990, and 1993.

[4] Bernatz testified that these notes may have been written while he was talking to Wunderlich. I infer that they were transcribed during the conversation. The last line, for example, appears to be a quotation of what Wunderlich said to Bernatz.

By May 8, Miller Waste had provided the Union with all the information it requested, including a list of employees' salaries by name, which the Company had been hesitant to divulge. Schneider went on a plant tour of the Winona facility during the same month. In July the parties agreed to hold their lust substantive meeting on August 26. They agreed that the Union would present its initial proposal at that meeting and that Respondent would present its response on August 29. The General Counsel does not contend that the 4-month hiatus between the first and second meetings was the fault of Respondent.

August 26, 1997 Meeting

During this period the Union conducted its survey, tallied the results, and reviewed the collective-bargaining agreement signed by the WFU and Miller Waste in February 1994. Respondent authorized Brian Stremcha and Steve Blank to attend a week long union conference in early August.[5] Just prior to the August 26 meeting. George Klingfus replaced Thomas Schneider, who underwent knee surgery, as the UAW's chief negotiator. When he attended his first meeting, Klingfus had not met with bargaining unit employees beforehand. He was only vaguely familiar with the Union's proposals and did not have an understanding of the negotiating team's priorities.[6] He had reviewed the 1994 WFU contract briefly.

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[5] The Union has no complaints about Respondent's dealings with it in the grievance process between April 1997 and February 26, 1998. In one instance the Union praised the conduct of RTP's representatives.

[6] The bargaining unit members of the negotiating team were Brian Stremcha, president of the Local, Ken Erickson, vice president, and Pat Berg, secretary-treasurer. Jerry Severson, union recording secretary and a member of the negotiating team in April, left Respondent voluntarily sometime in mid-1997. Mark Steuemagel, president of the Union at the time of the affiliation vote, may also have been a member of the negoti-

On August 26, Klingfus read the Union proposals to the company negotiators. Specific contract language was not presented to the company. The Union merely stated, for example, that it wanted a union-security agreement added to the WFU contract, that it wanted additional floating holidays, that it wanted wages improved each year of the agreement, that it wanted improved insurance benefits and reduced employee health insurance contributions. The Union also proposed a five-year step plan to get [wage] rates to pre-January 1985 date." The Union's objective was to eliminate the distinction between employees hired by Respondent before 1985 (Tier I employees) and those hired after that date (Tier II employees). Tier I employees were paid at a significantly higher base wage rate.

August 29, 1997 Meeting

Miller Waste presented its response to the union proposal on August 29. The proposal was read by Edward Bohrer, its chief negotiator. There was little discussion of the proposals since the meeting lasted only 30 minutes to an hour. The Company's initial proposal deleted union dues deduction, a task it had performed for the WFU. Miller Waste's rationale for this proposal was that the UAW "is in a position to handle its own financial affairs." The Company also opposed any union-security clause.

The Company asked for the right to establish "non-traditional" workdays, such as four 10-hour days. It proposed that employees be required to sign up for overtime in advance, which was another change from the WFU contract. Miller Waste asked for the right to cancel the New Year's Eve, Christmas Eve, and Good Friday holidays with 30 days'

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ating team at one time. He also voluntarily ceased working for Respondent in 1997. Erickson resigned his positions with the Union in January or February 1998.

notice and with the provision of a substitute day off with pay, or an extra day's pay.

Miller Waste's response to the Union's request for a reduction in the probationary period for new hires was an increase in the period. The parties eventually agreed to maintain the status quo regarding the probationary period, while giving Respondent a right to extend the period in particular cases after the Union's review. Respondent rejected the Union's request for a change in company procedures for overtime and transfer. The Union proposed a job bidding process with more weight given to seniority than was the case under the WFU contract.

With respect to wages, the Company proposed a wage freeze in 1997 and 1998, citing its December 1996 4-1/2-percent wage increase, as justification for the freeze. As to the two-tiered wage system, the company proposal stated that "it was open to negotiation of a method to reduce the difference" between the tiers, but that "it will take much longer than 5 years." The company proposal provided that any increase in health insurance benefits would be paid for by its employees.

The Company agreed to a union request to modify the language concerning work breaks to clearly indicate that employees on each shift were entitled to three 10-minute breaks.[7] It also agreed to update its seniority list regularly and provide it to the Union.

The September 16 Meeting

Prior to the next scheduled negotiation session on September 16, a union negotiating team member (or members) apparently told George Klingfus that the company

[7] Respondent also proposed a provision giving it discretion to require some or all employees to punch in and out at breaktimes.

was discriminating against UAW supporters with respect to wages. Respondent paid a number of employees a wage rate that exceeded the base wage set forth in its collective-bargaining agreement with the WFU. Klingfus was also told that there were individuals who were company supervisors who were in the bargaining unit and were doing work that should be done by other bargaining unit members.

Klingfus raised these issues with Respondent's chief negotiator, Ed Bohrer, in the hallway just prior to the September 16 session. Then when the meeting began, he threatened in an animated manner, to file unfair labor practice charges regarding discrimination in merit pay and an incident in which the local secretary/treasurer, Pat Berg, was pushed down the stairs of a blender. No such charges were ever filed and the Union has never established that Respondent discriminated against union members with regard to merit pay.

Klingfus also demanded that the "supervisors" be removed from the bargaining unit. Bohrer responded to Klingfus by asking him to provide a list of the individuals to whom he was referring.[8] This issue consumed a considerable amount of time at the September 16 meeting and at some later meetings. On September 16, the Union's Secretary/Treasurer Pat Berg began rewriting the WFU collective-bargaining agreement by hand as a means of presenting desired language changes to Respondent. After some period of time, Respondent objected to this procedure and the parties agreed

[8] This dispute concerned some or all of 26 section leaders/managers or assistant section leaders/managers listed on GC Exh. 47. Five of these employers were having union dues withheld from their paychecks in April 1997. These individuals report to one of three production managers or to the second- or third-shift supervisors. The production managers and shift supervisors, who are supervisory/ management, report to Manufacturing Manager Larry Stoltman.

that Bohrer's secretary would type up tentative agreements after each meeting.

The Union asked for changes to article I of the WFU contract which excluded laboratory employees from the bargaining unit.

These employees had always been treated as unit members and indeed, Union President Brian Stremcha and other union members worked in these laboratories. Respondent promised that it would continue to treat laboratory employees as bargaining unit members, but refused to change the contract language. The Union accepted the Company's representations.

The September 19, 1997 Meeting

Some minor agreements were reached at the September 19 bargaining session. Respondent agreed to grant employees bereavement leave in the event the death of their stepchildren or stepparents and to count such leave in computing eligibility for overtime pay. The agreement to include steprelatives, however, merely conformed to the Respondent's existing practice. The Union agreed to the nontraditional workday and the elimination of the employer-employee task force provided for in the WFU contract Respondent refused to budge on its insistence that it would not collect dues for the UAW or allow employees to bid on promotions and transfers. At the end of the meeting, Klingfus informed the Company that he would ask Federal mediator Bruce Danielson to attend the next meeting. A meeting scheduled for October 14 was cancelled by Klingfus.

The November 6 and 26, 1997 Meetings

UAW International Representative Thomas Schneider attended the first hour of the November 6 meeting, which was also attended by Federal mediator Bruce Danielson. Schneider alleged that the Company was not serious about reaching agreement and was bargaining in bad faith. Bohrer responded by accusing the Union for the slow pace and lack of progress in negotiations.

Some minor agreements were reached such as one regarding the consistency of language in computing time periods for the grievance procedure. On November 6, and 26, discussion centered on three issues: the Company's proposed right to move the New Year's Eve, Christmas Eve, and Good Friday holidays; the issue of whether certain employees were supervisors and eligible for bargaining unit overtime work and the Company's insistence that an employee have the right to pursue a grievance without the Union's blessing. There was no resolution with regard to any of these matters.[9]

On the morning of November 26, Respondent presented the Union with a document entitled "List of supervisors currently in the bargaining unit [G.C. Exh. 47]." In the meeting the Union took the position that only 2 of the 26 individuals on the list were supervisors within the meaning of the NLRA. The Company argued that these individuals were indistinguishable with regard to their supervisory status under the Act in that they all had some degree of authority to discipline employees and make work assignments. Respondent also argued that it had the right to have them

[9] Curiously, union negotiator Klingfus testified on two occasions (Tr. 642 and 726) that Respondent dropped its insistence that an individual employee be able to pursue a grievance. If this were so, it would indicate a major concession by Miller Waste. However, the notes of the company negotiators, Charles, Wunderlich, Ed Bohrer, and Frank Wohletz, as well as the testimony of Union President Brian Stremcha, establish that the Company never compromised on this issue (See, e.g., Exhs. R-8, R-28, and R-2 l, pp. 14-15).

perform overtime work regardless of whether or not they were in the bargaining unit.

December 11, 1997 Meeting

On the morning of December 11. 1997, both negotiating teams caucused separately at the Riverport Inn in Winona. At one point federal mediator Bruce Danielson entered the room of the union negotiators and told them that he didn't think they would get a collective-bargaining agreement unless they could show the Company that the Union had the support of the majority of the bargaining unit employees.[10] The three union negotiating committee members, President Brian Stremcha, Vice President Kenneth Erickson, and UAW International Representative George Klingfus, then engaged in a prolonged discussion of whether they should consent to an NLRB representation election.

In the afternoon the parties got together and agreed to such an election, pending approval from Klingfus' supervisor at the UAW. The also discussed wages and changes in employee health insurance benefits. In March 1997, the Union had filed an unfair labor practice charge because Respondent granted employees a very large wage increase

[10] No factual issue in this case is so hotly contested as the origins of the suggestion for an election. The company witnesses unanimously assert that, other than telling them to go to lunch, they didn't see mediator Danielson until the afternoon, when he informed them that the Union had decided that it wanted to have a representation election. Nevertheless, I find that the election idea was a result of the Union's discussions with Danielson, who was accurately conveying sentiments expressed to him by Respondent. I base this finding on the testimony of Ken Erickson, union vice president until January or February 1998, who was a member of the union negotiation team. Erickson, who no longer supports the Union, testified for Respondent. On direct examination, he supported Respondent's account. However, on cross-examination, he changed his testimony and it is that testimony which I conclude is closest to the truth.

without giving notice to the Union, or providing it with an opportunity to bargain. The Union promised not to file a charge if an increase was granted for 1998. Klingfus also promised not to use the raise as a means of getting an even greater wage increase in future negotiations. Finally, the Union agreed that Respondent could change employee health insurance benefits so long as the change did not offset the wage increase to the point of leaving employees with a net loss in compensation. Contract negotiations were suspended while the election proposal was broached to Klingfus' superiors.

The UAW Rejects a Representation Election and Files Two Grievances Regarding Overtime Worked by Supervisors

On December 12, Local Union President Brian Stremcha filed a grievance with Respondent alleging that on Saturday, December 6, "[f]orepersons were used to do work regularly performed by the bargaining unit employees during their regular work week." The grievance asked that "the appropriate employees" be paid for these overtime hours. On December 23, Stremcha filed an identical grievance with regard to work performed on Sunday, December 21.

Both grievances were declined by Respondent. In addition, Corporate Vice President Wunderlich had a meeting with the "bargaining unit supervisors" and told them that the Union wanted them out of the bargaining unit. He suggested that they talk to Stremcha about the grievances. Stremcha met with several of these individuals at a restaurant and told them that the Union believed that they were leadmen rather than supervisors.

Respondent's January 2, 1998 letter

On December 23, George Klingfus left Ed Bohrer a message stating that the Union could not agree to a representation election. On January 2, Respondent sent its employees a letter summarizing its negotiations with the UAW (GC Exh. 10).[11] The letter reviewed the discussions regarding a representation election and Klingfus' message of December 23. It continued as follows:

> *Wages and Benefits*
>
> During that same December 11th meeting, the UAW Union Committee stated they would allow RTP to give employees an increase in pay and to decrease insurance costs but no specifics were discussed. You will recall when RTP raised wages last year, the UAW filed an unfair labor practice charge against us.
>
> *Conclusion*
>
> We appreciate the need for increased wages and decreased insurance costs, but we cannot handle these things piecemeal. Wages and insurance are only part of the complete economic package, which also includes vacations, holidays, overtime and other issues which we've always dealt with at the same time. We also find it difficult to trust the UAW after they pulled the rug out from under us by denying an election. These and other issues must be resolved simultaneously.
>
> This is a sad occasion for all of us as this marks the first time in RTP's long history we won't be giving you a

[11] At the April 30 negotiation session Tom Schneider agreed with company negotiators that their discussions would remain confidential and that the parties would not engage, in letter writing campaigns. George Klingfus repudiated this agreement on September 16, on account of Respondent's alleged discrimination regarding merit pay.

wage increase at this time. Please understand this is not the way we do business. We are continually exploring ways to ensure that neither our employees nor RTP are damaged any further by this fiasco.

Thank you very much for your continued patience and understanding.

/s/ Benjamin A. Miller, President
/s/ Hugh L. Miller, CEO

George Klingfus wrote Respondent's attorney, Ed Bohrer, on January 12, 1998, complaining about the Company's January 2 letter. He said his understanding was that a raise would be given if no unfair labor practice charges were filed. Klingfus closed his letter by threatening to file an unfair labor practice charge unless Respondent retracted the January 2 letter and gave employees a wage increase.

On January 15, 1998, the Millers were presented with a petition signed by approximately half the bargaining unit. It asked that the Millers grant employees a fair and decent wage increase and better insurance benefits for 1998. A cover sheet given to the Millers states that the petition was "in no way shape or form connected with any organization or business. It is simple a request from your employees." One of the employees who circulated this petition was Scott Holubar, who had been a leader of the anti-UAW faction in the WFU.

The Millers responded to this letter the next day with a letter to employees granting them a 51-cent-per-hour wage increase "regardless of the UAW and the NLRB and all those problems." This constitutes the largest across-the-board wage increased given to RTP employees in at least 38 years. The January16 letter also indicated that Respondent was working on a reduction in employee health insurance costs. On

February 13, 1998, Respondent notified employees of a reduction in their contribution for health insurance premiums.

On February 13, 1998, Respondent informed the Union that it would no longer deduct dues or other union fees from employee paychecks. At some point a meeting was scheduled for February 26, 1998, to resume collective-bargaining negotiations. About 2 days prior to this meeting, Scott Holubar went to see Respondent's vice president, Chuck Wunderlich. Holubar told Wunderlich that he had a petition, with the signatures of 125 bargaining unit employees, stating that the employees did not want the UAW representing them. Wunderlich referred Holubar to Michael Bernatz, formerly the WFU's attorney.[12] Holubar arrived at Bernatz' office on February 25, with a petition signed by 129 of the 168 bargaining unit employees and left it with a secretary.[13]

Bernatz, who continued to represent Holubar, Robert Kashuba, and other anti-UAW employees[14] with regard to their employment, called Chuck Wunderlich. At some time during that afternoon, Bernatz also talked with Frank Wohletz, Respondent's Winona counsel and Paul Zech, a partner of Ed Bohrer in the Felhaber law firm. He asked their advice in wording a cover letter for the withdrawal petition to assure

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[12] There is no evidence of Respondent's involvement with the circulation of the withdrawal petition, or the January petition requesting a wage increase.

[13] The bargaining unit had about 200 employees. Approximately 55 were members of the Union in February 1998. There were about 74 members in April 1997.

[14] From Bernatz' notes I infer that Ernie Fratzke, who was involved with Holubar in the circulation of the withdrawal petition, was also a client of Bernatz Respondent's attorney, Ed Bohrer, described Bernatz as "an attorney representing the majority of the employees." (Tr. 1032.)

that it would be recognized by Respondent and, I assume, the NLRB.

Afterwards, Thomas Gort, an associate in Bernatz' office, drafted a letter to the Millers stating:

> Our office has represented a number of employees of Miller Waste Mills, Inc. I am writing you to put you on notice of the following. Our clients have advised us that a clear majority of the employees of Miller Waste Mills has signed a petition relating to the employees' union affiliation.
>
> A blank sample of the petition is attached to this letter as Exhibit A. Based on information that we have received, we believe that this letter accurately reflects the nature and status of that petition, and that we will presently be in possession of the signed original of the petition.

The blank sample declared that the signatories no longer wanted to be affiliated with the UAW and did not want the UAW to represent them. Bernatz rushed to deliver the letter to Respondent prior to the start of the next day's negotiating session, of which he was aware. Gort hand carried the letter to Chuck Wunderlich in the late afternoon of February 25, 1998. The Company did not receive a copy of the signed petition until June 1998.

The Events of February 26, 1998

Thomas Schneider was reassigned to the Miller Waste negotiations, replacing Klingfus, prior to February 16. Shortly after the outset of the negotiating session, Ed Bohrer presented Schneider, Brian Stremcha and Pat Berg a copy of the letter from Gort, with the blank petition. Bohrer informed the Union that in light of this letter the Company was no longer bargaining with it. Schneider became very angry and made some thinly veiled threats of violence, apparently directed at Wunderlich.

During or immediately after the meeting, Respondent's attorney, Frank Wohletz, called Mike Bernatz. Wohletz asked Bernatz to retain custody of the signed withdrawal petition. He also directed Bernatz to send him a statement of the services Bernatz had rendered to Winona Free Union for which he had not been paid. Bernatz sent a bill covering his services to the WFU from February 1, 1996, through his conversation with Wunderlich on April 3, 1997. The statement covered time spent talking to employees Scott Holubar, Jeff Serwa, and Bob Kashuba, as well as numerous conversations with Respondent and its attorneys (GC Exh. 56, attached to the General Counsel's brief). Wohletz paid Bernatz the $2,317.55 claimed in the statement and was reimbursed by Respondent.[15]

Unilateral Actions after February 26, 1998, Which are Alleged 8(a)(5) Violations.

Pursuant to its position that it was not obligated to recognize and bargain with the Union after February 25, 1998, Respondent failed to comply with a request for information submitted by Local 2340 President Brian Stremcha on February 16, and any subsequent UAW information requests. It has also refused to allow the Union to participate in the grievance process. On March 23, 1998, it informed Pat Berg that it would no longer authorize him to take time off for Local 2340 business.

Respondent has also dealt unilaterally with employees in a number of respects that are alleged as violations by the General Counsel. On March 19, 1998, Respondent sent its employees a letter informing them that it no longer recognized the UAW. It also informed them that the Company was reviewing its medical, 401(k), vacation, and

[15] Bernatz testified that he intends to bill for services rendered in February 1998. He did not indicate whom he intends to bill.

other benefits. On April 15, 1998, it unilaterally implemented a superior attendance incentive program. RTP also informed its employees of the availability of health insurance coverage through Blue Cross and Blue Shield of Minnesota.

Analysis

The General Counsel has not Established that Respondent Engaged in Surface Bargaining.

In *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984), the Board summarized the obligations of employers and unions under Section 8(a)(5):

> Under Section 8(d) of the Act, an employer and its employees' representative are mutually required to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment...but such obligation does not compel either party to agree to a proposal or require the making of a concession." Both the employer and the union have a duty to negotiate with a "sincere purpose to find a basis of agreement," but "the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position" The employer is, nonetheless, "obligated to make some reasonable effort in some direction to compose his differences with the union, if Section 8(a)(5) is to be read as imposing any substantial obligation at all."
>
> It is necessary to scrutinize an employer's overall conduct to determine whether it has bargained in good faith. "From the context of an employer's total conduct, it must be decided whether the employer is lawfully engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. A party is entitled to stand firm on a position if he reasonably believes that it is

> fair and proper or that he has sufficient bargaining strength to force the other party to agree.
>
> ....
>
> Although an adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith ... other conduct has been held to be indicative of a lack of good faith. Such conduct includes delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings.[16]

On the one hand there are a number of aspects regarding Respondent's conduct at and away from the bargaining table that points to a determination not to reach agreement with the Union, or "surface bargaining." These include its "brainstorming" with Bernatz at the outset of the negotiations, its position regarding dues-checkoff proposals that were somewhat more onerous that those in its contract with the WFU and the lack of any significant concessions to the Union during negotiations. None of these factors, however, necessarily establishes badfaith bargaining, *White Cap, Inc.*, 325 NLRB 1166 (1998).

In *NLRB v. J. P. Stevens & Co.,* 538 F. 2d 1152, 1165 (4th Cir. 1976), the court observed that "[e]very position on issues of mandatory bargaining like dues check off, must reflect a legitimate business purpose, otherwise the company has not bargained in good faith." In the instant case I cannot see any legitimate business purpose in Respondent's insistence that the UAW collect its own dues. Similarly, the record belies

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[16] Case citations from the Board's decision have been omitted.

Respondent's assertions that it made any significant concessions to the Union during the negotiations. It claims that it conceded a lot by agreeing to discuss a graduated elimination of its tiered wage structure. However, I conclude it conceded nothing because it did not make any concrete proposal in response to the Union's proposed 5-year plan to equalize wages for pre- and post-1985 hires.

All this being said, I cannot conclude that Respondent engaged in surface bargaining. Had it stuck to all these positions and even if it had struck to some of them to the point of impasse, I might be inclined to find "surface bargaining." However, negotiations never progressed far enough to determine whether Respondent's proposals were designed to thwart any agreement, or were merely tools to gain concessions on other issues. Moreover, the Union was at least as much at fault for the lack of progress as Respondent.

It is not alleged that Respondent engaged in many of the tell-tale signs of surface bargaining. For instance, the Company did not arbitrarily schedule and cancel bargaining sessions, or decline to make its negotiators reasonably available. Indeed, the lack of haste in starting and conducting substantive negotiations appears to be as much the responsibility of the Union as it is Respondent's. Furthermore, Miller Waste complied with all information requests submitted by the Union until the February 16, 1998 request by Stremcha.[17] Respondent dealt fairly with the Union in the grievance process and provided union officials an opportunity to attend to union business up until February 26, 1998.

Respondent can not be saddled with responsibility for the fact that negotiations were not completed by the end of 1997, or the predicament in which the Union found itself as a result.

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[17] Respondent claims it would have complied with Stremcha's request on February 26, 1998, but for the withdrawal petition.

The Union knew that Respondent traditionally raised wages at the beginning of each year. It was thus on notice that if negotiations were not concluded that the wage increase would be delayed unless it waived its right to bargain with respect to the increase.

Despite this fact, the Union wasted much of the negotiating sessions on issues that appear to have either had no merit, or were not well thought out. Most notable in this regard is the time spent on the allegation of discrimination against union members with regard to merit pay and the "bargaining unit supervisor" issue. With regard to the former, there appears to be absolutely no basis for the assertions made by the Union at the bargaining sessions. The latter issue seems to be a poorly articulated concern, never adequately explained either in negotiations or at this hearing.

Union President Stremcha objected to the performance of overtime work by certain employees. He never articulated which employees were barred from such work by the WFU contract until the Company provided a list of 26 section leaders. While the Union ultimately took the position that 2 of the 26 were barred from overtime work, it has not shown how these 2 are distinguishable from the others.[18]

The question of whether a particular individual is a supervisor within the meaning of the Act was described by Judge Goldberg of the 5th Circuit as "persistently vexing," *NLRB v. Security Guard Service*, 384 F.2d 143, 1435 (5th Cir. 1967). The resolution of this issue requires a determination of whether the individual exercises authority with regard to certain responsibilities enumerated in Section 2(11) of the Act, such as hiring, firing, and directing the work of others, in

[18] It is not clear that the grievances filed by the Union in December, concerned work performed by these two individuals, other Section leaders, or the production managers or shift supervisors.

a manner requiring the use of independent judgment. Moreover, one who exercises at least some of these responsibilities on a sporadic basis and in a manner largely incidental to his or her own work may not necessarily be a statutory supervisor, *Southern Bleachery & Print Works, Inc.*, 115 NLRB 787, 791 (1956), enfd. 257 F.2d. 235, 239 (4th Cir.1958).

The fact that so much of the parties' time in negotiations case was spent unproductively discussing the supervisor issue appears to be the responsibility of the Union, not the Respondent. If the Union had a legitimate concern about the scope of the bargaining unit, it should have been able to identify which individuals it was concerned with and should have been able to provide a basis for distinguishing these individuals from the "bargaining unit supervisors" it now claims were not statutory supervisors.

Respondent's January 2, 1998 Letter Violated Section 8(a)(1) and is not Protected by Section 8(c) of the Act

While Respondent's January 2, 1998 letter to its employees accurately summarized the events surrounding the tentative agreement by the Union to an representation election, it concludes by blaming the UAW for the fact that employees would not be getting their annual wage increase. The Company, however, believed that the Union had given its blessing to a wage increase and had waived its right to bargain over the raise. If the Company had any concerns that the Union had changed its position or had not waived its right to bargain, these were dispelled by Klingfus' letter of January 12. Respondent's behavior in granting the wage increase on January 15, indicates that it understood that the Union had not reneged on its agreement with regard to the wage increase and had waived its right to bargain; otherwise, the increase would

have constituted direct dealing, an obvious and blatant 8(a)(5) violation.[19]

Nevertheless, Respondent made no attempt to correct the impression it gave to employees that the Union had tried to prevent or at least been an impediment to the wage increase. This was not an expression of views, argument, or opinion protected by Section 8(c). It was a misstatement of fact, which would reasonably tend to undermine employees' confidence and support for the Union. It is not surprising that employees would become alienated from a union which they believed had prevented a wage increase. I therefore conclude that the litter would reasonably tend to restrain employees in the exercise of their rights under Section 7, and thus violated Section 8(a)(1), *Hillhaven Rehabilitation Center*, 325 NLRB 202 (1997).

Respondent Did Not Violate the Act in Notifying the Union on February 9, 1998, that it Would no Longer Deduct Union Dues from Employees' Paychecks

Paragraph 9(i) of the complaint alleges that Respondent violated the Act by ceasing the deduction of union dues from employees' paychecks. An employer is not required to continue to deduct such dues if its collective-bargaining agreement with the Union has expired, *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), enf. denied on other grounds 320 F.2d 615 (3d Cir. 1963). Respondent's collective-bargaining

[19] The General Counsel argues that the Union did not waive its right to bargain over the wage increase and reduction in employee insurance premiums. I conclude that it did so at the December 11, 1997 negotiating session, and reiterated this waiver by virtue of Klingfus' January 12 letter to Respondent. Statements made by Klingfus at the December 11 negotiating session clearly intended and expressed a conscious relinquishment of the Union's right to bargain over changes in insurance premiums, so long as they did not completely offset any wage increase, *Intermountain Rural Electric Assn.*, 305 NLRB 783, 786 (1991), enfd. 984 F.2d 1562 (10th Cir.1993).

agreement with the WFU provided that it would remain in force until December 31, 1996, and from year to year thereafter, unless either party gave notice no earlier than 90 days, and no later than 60 days prior to the expiration of the contract, that it wished that the contract be terminated or amended.

The Union gave notice in 1996 and 1997 that it wished to negotiate amendments to the contract. Respondent contends that, as a result, the contract expired on December 31, 1996, or alternatively, on December 31, 1997. It is evident that both parties regarded the contract to be in force throughout 1997. A literal reading of the WFU contract would indicate that it expired on a request for amendment. Further, it is not clear what the parties understood to be the status of the WFU contract after December 31, 1997. Therefore, I conclude that the General Counsel has not established that it was still in force in February 1998. Respondent was thus entitled to cease deducting dues payments.

Respondent was not Entitled to Withdraw Recognition from the Union on February 26, 1998

A union is irrebuttably presumed to continue to enjoy the support of a majority of the unit employees for 1 year after its certification and after the certification year has elapsed, while a collective-bargaining agreement is in effect. After the contract expires, the union is still presumed to enjoy majority status, but the presumption is rebuttable. In the latter situation, the employer may rebut the presumption and withdraw recognition if it can show that the union in fact no longer has the support of a majority of the unit employees, or that the employer has a reasonably based doubt, based on objective considerations, as to the union's continued majority status. Any such doubt, however, must be raised in a context free of unfair labor practices of the sort likely, under all the circumstances, to affect the union's status, cause employee

disaffection, or improperly affect the bargaining relationship, *Lee Lumber & Building Material Corp.*, 321 NLRB 175 (1996), *enfd. in relevant part* 117 F.3d 1454 (D.C. Cir.1997).

In cases in which it is established that the employer unlawfully refused to recognize and bargain with the incumbent union a relationship between these unlawful acts and the union's subsequent loss of majority support may be presumed. However, in cases involving unfair labor practices other than a general refusal to bargain, the Board has identified several factors as relevant to determining whether a causal relationship exists between unremedied unfair labor practices and the subsequent expression of employee disaffection with an incumbent union. These factors include:

> (1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

Williams Enterprises, 312 NLRB 937 (1993), enfd. 50 F.3d 1280 (4th Cir.1995).

In the instant matter the first three factors set forth above would cut in favor of a finding that Respondent's withdrawal of recognition on February 26, 1998, was illegal. The January 2 letter was likely to cause disaffection 6 weeks later when the withdrawal petition was circulated. The fourth factor, however, is much harder to analyze because there was widespread disaffection with the Union before Respondent sent out its letter. This issue is related to Respondent's assertion that it had reasons, apart from the withdrawal petition, to doubt the Union's majority support.

It is apparent that Respondent did not feel confident withdrawing recognition from the Union until it had confirmation regarding the withdrawal petition. However, that petition is substantially tainted by the January 2 letter and does not provide a basis for legally withdrawing recognition. The General Counsel does not challenge Respondent's contention that the Union did not have majority support on February 26. The issue is whether Respondent had a good-faith doubt as to the Union's majority status without the petition.

At pages 28-29 of its brief Respondent sets forth the factors on which it relies in contending that it had a good-faith doubt as to the UAW's majority status. These factors warrant scrutiny individually:

a. There had been at least one and maybe two prior attempts by employees to get rid of the UAW, which were rejected by the NLRB: These petitions were circulated in 1996 and were thus tainted by Respondent's initial unlawful refusal to recognize and bargain with the UAW. They provide no basis for a reasonable good-faith doubt as to the Union's majority status in February 1998.

b. There had been constant turmoil amongst employees over the affiliation with the UAW: This was "old news" in February 1998. It is obvious from the prior Board decision and common knowledge to everyone involved in this matter that that was strong opposition to the UAW within the bargaining unit and that at least some of the individuals opposing the UAW had not changed their view since February 1996. This knowledge provides no basis for concluding that Respondent had a reasonable good-faith doubt as to the UAW's majority support in February 1998.

c. The Union never had more than 75 members and, just prior to the petition, had only 55-60 members: This also pro-

vides no basis for a reasonable good-faith doubt. In affirming the Board in an analogous case, Judge Winter of the Fourth Circuit Court of Appeals noted:

> A showing that less than a majority of the employees in the bargaining unit were members of the union or paid union dues was not the equivalent of showing lack of union support. Manifestly, in the absence of a closed shop agreement . . . many employees are content neither to join the union nor to give it financial support but to enjoy the benefits of representation. Nonetheless, the union may enjoy their support, and they may desire continued representation by it.

Terrell Machine Co. v. NLRB, 427 F.2d 1088, 1090 (4th Cir. 1910), enfg. 173 NLRB 1480 (1969).

d. As recently as the spring of 1997, when the final resolution of the first case was achieved, a mass resignation from union membership occurred: This mass resignation probably occurred in the spring of 1996 and thus may be tainted by Respondent's initial refusal to recognize and bargain with the Union.

e. Union Vice President Ken Erickson told Chuck Wunderlich in December 1997, that he and Stremcha would ask the NLRB for a representation election even if the UAW region did not agree to such an election: First of all, I decline to credit Wunderlich's testimony to this effect in part because it was not corroborated by Erickson, a witness now favorably disposed to Respondent. Secondly, a willingness to submit to a representation election does not necessarily indicate a belief that the Union would lose. Indeed, it is difficult to understand why an incumbent Union would voluntarily agree to a representation election in such circumstances. Indeed, Erickson testified that while he favored submitting to a

representation election, it was not because he had questions about the Union's majority status (Tr. 592-93).

f. The Union spent 4-5 hours deliberating on whether to agree to a representation election: Having concluded that the fact that the Union tentatively agreed to the election does not provide Respondent with a basis for a good-faith doubt as to majority status, the Union's deliberations cannot do so either.

g. The Union only received 30 responses to its survey soliciting input from bargaining unit members before the August 26, 1997 bargaining session: Since the number of members is not a valid reason to doubt the Union's majority status, the fact that members and nonmembers may have eschewed an active part in the Union's deliberations does not constitute a valid reason for such doubt.

h. There was significant union officer turnover, without replacement: The fact that Brian Stremcha and Pat Berg appear to have been the only union officers in February 1998, does not provide a basis for Respondent to conclude that the Union did not have majority support. First of all, the fact that an employee does not want to become actively involved in union affairs does not mean that he does not want continued union representation. Moreover, the inability of the Union to procure a replacement for Ken Erickson could be due in part to the disaffection created by the January 2,1998 letter.

i. The "bargaining unit supervisors" expressed dissatisfaction with the Union's attempt to remove them from the bargaining unit: Respondent had little knowledge regarding how many of these employees ever supported the UAW[20] or how many changed their minds as the result of the Union's negotiation strategy regarding their status. Moreover,

[20] Other than the fact that several were having union dues deducted from their paychecks.

Chuck Wunderlich advised these employees to discuss their situation with Brian Stremcha and there is no indication that Respondent knew whether or not some, or all, of these individuals were satisfied with Stremcha's explanation.

j. Employees had withdrawn support from the Chemical Workers Union in 1984: That the Chemical Workers lost the support of a majority of employees in 1984 has no relevance to whether the Union had the support of a majority of employees in 1997 and early 1998.

k. Scott Holubar told Respondent that a majority of employees had signed a petition to throw out the UAW: Like the petition itself, this information is tainted the January 2, 1998 letter and cannot be relied upon by Respondent.

While Respondent had evidence of some disaffection with the Union, I conclude that it did not have any objective basis for a reasonable doubt that the Union lacked majority support that was untainted by its unfair labor practice. The Company's rush to get evidence of the petition before the February 26 negotiating session virtually proves this.

Respondent Violated Section 8(a)(l) and (5) in Bypassing the Union and Dealing Unilaterally with its Unit Employees After February 26, 1998, and in Failing to Provide the Union with Requested Information, and in Refusing to Grant Union Officials Time off for Union Business

Having found that Respondent was not entitled to withdraw recognition and cease its bargaining with the Union on February 26, 1998, all the allegations for which Respondent relies on the withdrawal as a defense violated the Act. These include benefits directly granted to employees without consulting the Union, the refusal to comply with the Union's information requests, refusal to allow the Union to

participate in the grievance process and denial of the requests of union officials for time off to attend to union business.

Respondent Violated Section 8(a)(2) of the Act in Paying Michael Bernatz' Legal Fees for Services he Rendered to the Winona Free Union.

Section 8(a)(2) makes it an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. As noted in Hardin, *The Developing Labor Law* (3d ed. 1992) at p. 289, the primary purpose of this Section is to eradicate company unionism, a practice in which employers establish and control inhouse labor organizations in order to prevent organization by autonomous unions.

Respondent paid Michael Bernatz through its attorney, Frank Wohletz, for services Bernatz rendered between February l, 1996, and April 3, 1997. These services were rendered to Robert Kashuba, Scott Holubar, Ernic Fratzke, Jeff Serwa, and other anti-UAW employees with regard to their employment with Respondent. Indeed, these services appear to pertain solely to the issue of whether RTP employees would be represented by the UAW. Respondent's defense to the allegation that its payments to Bernatz violated Section 8(a)(2) is that Bernatz' clients were not a labor organization within the meaning of Section 2(5) of the Act.

Section 2(5) provides as follows: The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. This is a term that

Congress meant to be defined broadly. A group may meet this definition even if it lacks a formal structure, has no elected officers, constitution or bylaws, does not meet regularly, does not require payment of initiation fees or dues, and does not engage in collective bargaining with the employer, *Electromation, Inc.*, 309 NLRB 990 (1992), enfd. 35 F.3d 1148 (7th Cir.1994).

Bernatz' clients were a labor organization within the meaning of this definition. They acted in concert in dealing with Respondent to get rid of the UAW.[21] Their status as members of a bargaining unit represented by the UAW constitutes a "condition of work" within the meaning of Section 2(5). Therefore, I conclude that Respondent violated Section 8(a)(2) as alleged.

Respondent Violated Section 8(a)(1) in its Pretrial Interview of Employee Ken Erickson

In preparation for the hearing in this matter, Respondent's attorneys issued a subpoena duces tecum to employee Ken Erickson, who had been the Union's vice president until January 1998. Counsel interviewed him in a conference room at Respondent's plant a week prior to the hearing. At the outset of the interview Respondent's attorney presented Erickson with a written notice explaining that the purpose of the interview was to investigate the Union's allegations of unfair labor practices. The notice concluded:

> Your participation in this interview is completely voluntary. No discrimination will result if you choose not to participate and no reward will result if you choose to participate [R Exh. 17].

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[21] In March 1996, Kashuba posted several position statements claiming that the WFU continued to exist in an unaffiliated form, *RTP Co., supra.*

When Erickson arrived for the interview, Respondent's human resources director, Richard Kulas, and manufacturing manager, Larry Stoltman, were in the conference room with their counsel. They asked him if he wanted them to leave. Erickson replied that it did not matter to him, so they stayed. Attorney Zech asked about the dates of Erickson's tenure as a union officer and whether he attended all the contract negotiation sessions. Zech inquired as to whether Erickson signed the withdrawal petition. They discussed Erickson's understanding of the petition when he signed and his opinion of George Klingfus.

In response to the subpoena Erickson supplied Zech with notes of union meetings which identified employees who attended those meetings and contained Erickson's notes as to what transpired during those meetings.

The General Counsel, pursuant to an amendment to the complaint made during the hearing alleges that Respondent violated Section 8(a)(1) in conducting the interview in the presence of Kulas and Stoltman giving inadequate assurances that no reprisals would take place if Erickson did not choose to participate, by inquiring into Erickson's reasons for signing the decertification petition and inquiring into the identities of employees who attended union meetings and the topics discussed.

The Board in *Johnnie's Poultry*, 146 NLRB 770 (1964), established safeguards designed to minimize the coercive impact of an investigatory interview by an employer, while allowing the employer to investigate facts concerning issues raised in the complaint, It stated that the employer:

> Must communicate to the employee the purpose of the questioning, assure him that no reprisals will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context fire from employer

hostility to union organization and must not be itself coercive in nature, and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

I conclude that the written notice given to Erickson satisfied Respondent's obligation to explain the purpose of the interview and assure him that no reprisals would take place. However, I conclude that Respondent violated Section 8(a)(1) by conducting the interview in the presence of Kulas and Stoltman. Respondent is not entitled to put the burden on the employee as to whether management employees attend such an interview. An employee in Erickson's position will tend to feel inhibited in insisting that they leave, a decision that itself might be viewed by management as uncooperative.[22]

While there may be situations in which the presence of a management official may be necessary in assisting counsel, there is no indication that this was true in the instant case. An employee is more likely to be intimidated in answering questions in front of management officials with day-to-day authority over him than to an attorney he is likely to encounter only once or twice.

Although Respondent's counsel was clearly entitled to determine whether Erickson would corroborate its witnesses' account of the negotiations, it violated Section 8(a)(1) in obtaining from him documents that identified employees who attended union meetings and indicated the nature of the discussions at those meetings. Respondent also violated the Act in questioning Erickson about those meetings, which may

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[22] I conclude that it is irrelevant that Respondent had reason to believe that Erickson no longer supported the Union, and may have been sympathetic to RTP with respect to the unfair labor practice charges, *Le Bus*, 324 NLRB 588 (1991).

have revealed to the Employer union sympathizers and union activities of which the Employer was not previously aware.

Respondent could have attempted to prove that it had a reasonable good-faith doubt of the Union's majority status without inquiring into the identity of those of who attended union meetings and what was discussed. Only information that it had at the time of withdrawal would be relevant to its good-faith doubt. The number of people attending union meetings is also insufficiently probative of whether the Union actually had majority support that Respondent's inquiries with regard to these meetings is unjustifiable.

CONCLUSIONS OF LAW

1. By its letter of January 2, 1998, Respondent violated Section 8(a)(1) of the Act in undermining the Union and discouraging employee support for the Union by misrepresenting the reason employees would not be getting a wage increase and by blaming the Union for Respondent's decision not to give a wage increase, when in fact, Respondent knew that the Union had acceded to the wage increase.

2. On February 26, 1998, Respondent violated Section 8(a)(1) and (5) in withdrawing recognition of the Union and refusing to bargain with it further.

3. Since February 26, 1998, Respondent has violated Section 8(a)(1) and (5) by bypassing the Union and dealing directly with unit employees in the following respects:

a. Sending its employees a letter on March 19, 1998, informing them that Respondent was reviewing its medical, 401(k), vacation, and other benefits.

b. Unilaterally implementing a superior attendance incentive program on April 15,1998;

c. Informing employees of the availability of health insurance coverage through Blue Cross and Blue Shield of Minnesota in May 1998.

4. Respondent violated Section 8(a)(1) and (5) by refusing to comply with the information request submitted by Union President Brian Stremcha on February 16, 1998.

5. Respondent violated Section 8(a)(1) in informing Pat Berg that it would no longer authorize him to take time off for union business on March 23, 1998.

6. Since February 26, 1998, Respondent has violated the Act in refusing to allow the Union to participate in the grievance process.

7. Respondent violated Section 8(a)(2) in paying Attorney Michael Bernatz for legal services rendered to anti-UAW bargaining unit employees.

8. Respondent violated Section 8(a)(1) in conducting its pretrial interview of employee Kenneth Erickson in the presence of its manufacturing manager and human relations manager. It also violated Section 8(a)(1) by inquiring into matters that revealed the identity of employees who attended union meetings and the discussions that took place at those meetings.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent will be ordered to recognize and resume negotiations with the union on request.[23] It will be ordered, by its president or senior vice president/chief executive officer, to read to assembled employees the notice to employees, which appears at the end of this decision, in addition to posting the notice. Respondent will also be ordered to bargain collectively in good faith with the Union for a reasonable period of time concerning wages, hours, and other terms and conditions of employment, and if an understanding is reached, to embody it in a written agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, Miller Waste Mills, Inc., d/b/a RTP Company, Winona, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize, and refusing to bargain collectively in good faith with the Union as the exclusive

[23] A bargaining order is the Board's traditional remedy in this type of case, *Bi-Craft Litho*, 316 NLRB 302 (1995). Given the fact that Respondent had no basis for ceasing to bargain with the Union-apart from the illegal withdrawal of recognition, I see no reason to depart from this tradition. Respondent's argument that a bargaining order is inappropriate because the Union never had the support of a majority of the unit employees, is essentially an effort to relitigate the initial Board decision, which ordered it to bargain with Local 2340 and upheld the validity of the affiliation vote.

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

bargaining representative of the employees in the following appropriate unit:

> All production and maintenance employees employed at its plant in Winona, Minnesota; excluding office and clerical employees, engineering department employees, draftsperson, plant clerical employees, and all guards and supervisors as defined by the National Labor Relations Act, as amended.[25]

(b) Misrepresenting to employees positions taken by the Union.

(c) Bypassing the Union and dealing directly with unit employees.

(d) Rendering financial or other assistance to employees who oppose the UAW.

(e) When preparing for an unfair labor practice proceeding, interrogating employees in the presence of supervisors, and inquiring into union activities and discussions that occurred outside of the presence of management personnel.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if

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[25] I have described the unit in accordance with the parties' mutual understanding that laboratory employees are included in the bargaining unit.

an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees employed at its plant in Winona, Minnesota; excluding office and clerical employees, engineering department employees, draftsperson, plant clerical employees, and all guards and supervisors as defined by the National Labor Relations Act, as amended.[26]

(b) Recognize, and bargain with the Union for a reasonable period of time.

(c) Provide the Union with the information it requested on February 16,1998.

(d) Allow union officials to conduct union business during scheduled worktimes.

(e) Within 14 days after service by the Region, post at its Winona, Minnesota facility copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the

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[26] I have described the unit in accordance with the parties' mutual understanding that laboratory employees are included in the bargaining unit.

[27] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2, 1998.

(f) Within 14 days after service by the Region, the attached notice marked "Appendix" shall be read to assemblies of all unit members by either Respondent's president or senior vice president/chief executive officer.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHERED ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found. Dated, Washington, D.C. September 22, 1998.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights: To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain collectively in good faith with Local 2340 of the United Auto Workers, as the exclusive bargaining representative of employees in the following unit:

> All production and maintenance employees employed at its plant in Winona, Minnesota; excluding office and clerical employees, engineering department employees, draftsperson, plant clerical employees, and all guards and supervisors as defined by the National Labor Relations Act, as amended.

WE WILL NOT misrepresent to employees positions taken by the Union.

WE WILL NOT bypass the Union and deal directly with employees regarding pay, benefits, and other working conditions.

WE WILL NOT render financial or other assistance to employees opposed to representation of our employees by the United Auto Workers.

WE WILL NOT, if preparing for hearings in unfair labor practice proceedings, interrogate employees in front of

supervisors. or inquire into union activities and discussions that took place out of the presence of company management officials.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL on request, bargain in good faith with the Union, as the exclusive bargaining representative of our employees in the above-described bargaining unit with respect to wages, hours, and other terns and conditions of employment for a reasonable period of time.

WE WILL recognize and treat the Union as the exclusive agent of employees in the bargaining unit.

MILLER WASTE MILLS, INC., d/b/a RTP COMPANY

NOT INCLUDED IN
BOUND VOLUMES

HLB
Winona, MN

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MILLER WASTE MILLS, INC.
d/b/a RTP COMPANY

and

Case 18-CA-14768

INTERNATIONAL UNION,
UNITED AUTOMOBILE,
AEROSPACE & AGRICULTURAL
IMPLEMENT WORKERS OF
AMERICA, UAW

ORDER DENYING MOTION

On July 11, 2001, the National Labor Relations Board issued a Decision and Order in this proceeding finding, inter alia, that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union and that an affirmative bargaining order was necessary to remedy the Respondent's unlawful conduct.[1]

[1] 334 NLRB No. 69. The Board reasoned that the Respondent was not entitled to withdraw recognition from the Union because there were unremedied unfair labor practices tending to cause employees to be disaffected from the Union. The Board specifically relied on the following three unfair labor practices: (1) On January 2, 1998, the Respondent violated Sec. 8(a)(1) by blaming the Union for preventing a wage increase; (2) On January 16, 1998, the Respondent violated Sec. 8(a)(5) and (1) by bypassing the Union and dealing directly with unit employees concerning a wage increase; and (3) On February 13, 1998, the Respondent again violated Section 8 (a) (5) and (1) by bypassing the

On August 10, 2001, the Respondent filed a motion to reopen the record, and on August 24, 2001, the General Counsel filed an opposition to the motion. On August 28, 2001, the Board filed a petition for enforcement of the Board's Order in the United States Court of Appeals for the Eighth Circuit, and on October 10, 2001, the Board filed the record with the court. Due to inadvertence, the Respondent's motion and the General Counsel's opposition were not forwarded to the Board for ruling until the record was filed with the court.

On December 10, 2001, the court issued an Order granting the Board's motion to suspend the briefing schedule, and remanding the case to the Board so that the Board can consider the Respondent's pending motion before the Board to reopen the record.

The Respondent's motion alleges that if the record is reopened, the Respondent will adduce evidence of "changed circumstances" establishing that an affirmative bargaining order is not warranted to remedy the Respondent's unlawful withdrawal of recognition from the Union. For the following reasons, we deny the motion.

Under Section 102.48(d) of the Board's Rules, a motion to reopen the record "shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different In addition, a motion for leave to adduce new evidence "shall be filed promptly on discovery of such evidence." As

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Union and dealing directly with employees concerning their health insurance costs. *Id.*, slip op. at 3.

Chairman Hurtgen and Member Bartlett did not participate in the Board's decision.

explained below, the Respondent's motion fails to satisfy the requirements of this rule.

The evidence that the Respondent seeks to adduce falls into three categories:

1. Evidence of employee turnover. The Respondent states that it "seeks to introduce evidence (which was just recently discovered) that there has been a substantial amount of turnover since the allegedly disaffection causing, unlawful communications, making an affirmative bargaining order unneeded and unwarranted."

We deny the Respondent's motion on the ground that this "turnover" contention was not timely raised. The unlawful conduct in question occurred in January and February 1998, the hearing was held in June and July 1998, the judge's decision issued in September 1998, and the Board's decision issued in July 2001. Although the Respondent filed exceptions to the judge's decision, including his recommended bargaining order, the Respondent did not argue before the Board that a bargaining order was unwarranted on the basis of employee turnover dating back to 1998. Instead, the Respondent waited until one month after the Board issued its decision to raise the turnover issue.

Employee turnover is normally a matter within the knowledge of an employer. Although the Respondent summarily asserts that the turnover evidence "was just recently discovered," it does not explain why it did not learn until August 2001 that substantial turnover had been occurring during the preceding three years at its own facility. It is well established that "facts implying reasonable diligence must be provided" by the party alleging evidence is newly discovered. *NLRB v. Joseph E. Decker & Sons*, 569 F.2d 357, 363-364 (5th Cir. 1978). The Respondent's motion, however,

fails to "show that it acted with the diligence required to establish that it was excusably ignorant" of changes in its own employee complement. *Fitel/Lucent Technologies, Inc.*, 326 NLRB 46 fn. 1 (1998). Therefore, we conclude that the Respondent's motion is deficient because it fails to state, as required by Section 102.48(d) of the Board's Rules, "why [the evidence] was not presented previously."

Our conclusion is supported *by Blockbuster Pavilion v. NLRB*, 82 F.3d 1074 (D.C. Cir. 1996), in which the court held that the burden is on a respondent to timely bring to the Board's attention evidence of changed circumstances that would mitigate the need for a *Gissel* bargaining order.[2] Thus, the court stated in *Blockbuster* that before issuing such an order, "the Board has no affirmative duty to inquire whether employee turnover or the passage of time has attenuated the effects of earlier unfair labor practices." 82 F.3d at 1080. On the facts of *Blockbuster*, the court found that the company's motion to' reopen the record was timely because it was filed "with reasonable promptness following issuance of the ALJ's recommendation of a bargaining order." Id. As discussed above, the same cannot be said of the Respondent's motion here.[3] Accordingly, we deny the Respondent's motion insofar as it seeks to reopen the record on the turnover issue.

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[2] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). We recognize that the instant case involves a bargaining order to remedy a withdrawal of recognition, rather than a *Gissel* bargaining order. However, in both situations, the issue is the propriety of a bargaining order.

[3] *See also Electro-Voice, Inc.*, 321 NLRB 444 (1996) (citing *Blockbuster* and denying the respondent's motion to reopen the record in part on timeliness grounds; the respondent "failed to state why it neglected to offer the [changed circumstance] evidence until after the Board issued its decision").

2. *Evidence of passage of time*. The Respondent states that it "seeks to introduce evidence that the amount of time that elapsed between Respondent's allegedly disaffection-causing, unlawful communications and the issuance of the Board's Decision and Order render an affirmative bargaining order unnecessary and inappropriate."

When the Board issued the bargaining order in this case, the Board was well aware that over three years had passed since the unlawful conduct had occurred. Therefore, the Respondent's motion on the passage-of-time issue does not raise any new matters. Further, the Respondent has not shown that the evidence it seeks to adduce would require a different result.

3. *Evidence of change in management*. The Respondent states that it "seeks to introduce evidence that Respondent's (former) Vice President of Human Resources/ Labor Relations, Charles E. Wunderlich (undoubtedly the principal target of the General Counsel and the Charging Party) is no longer employed by Respondent, obviating the need for a bargaining order."

As stated in footnote 1, supra, the Board found that the Respondent committed three unfair labor practices that would tend to cause employees to become disaffected from the Union. A review of the record reveals that these unfair labor practices consisted of letters to employees that were signed by the Respondent's president, Benjamin Miller, and its chief executive officer, Hugh Miller. Thus, all three critical unfair labor practices were not committed by Wunderlich, but by his superiors. Therefore, contrary to the Respondent's contention, Wunderlich's alleged departure from employment has no bearing on whether "the need for a bargaining order" has been "obviat [ed] ." Accordingly, we deny the Respondent's motion on the change-in-management issue on the ground that the

Respondent has not shown that the new evidence would require a different result.[4]

Dated, Washington, D. C., March 25, 2002

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[4] In addition, the Respondent does not assert that Wunderlich's departure occurred after the closing of the hearing.

NATIONAL LABOR RELATIONS ACT

29 U.S.C. §§ 151-169

RIGHTS OF EMPLOYEES

SEC. 7. (§ 157) Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (§ 158) (a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor

organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the "effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer

organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring (any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection [8](b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of

such employees whom such employer is required to recognize under this Act: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount
which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their

collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or

Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a) of this Act, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified i subsection (g) of this section, shall lose his status as an employee of the employer engaged i_n the particular labor dispute, for the purposes of sections 8 to 10 of this Act, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building,

structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer", "any person engaged in commerce or in industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for

employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

(g) A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

REPRESENTATIVES AND ELECTIONS

SEC. 9. (§ 159) (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or

agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) (1) wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial.

Supreme Court, U.S.
FILED
JUN 16 2003
OFFICE OF THE CLERK

(2)

No. 02-1501

In the Supreme Court of the United States

MILLER WASTE MILLS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the finding of the National Labor Relations Board that petitioner withdrew recognition from the union on the basis of an employee petition that was tainted by antecedent unfair labor practices.

2. Whether the Board acted within its remedial discretion in issuing an affirmative bargaining order.

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In the Supreme Court of the United States

No. 02-1501

MILLER WASTE MILLS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 315 F.3d 951. The decision and order of the National Labor Relations Board (Pet. App. B1-B23), and the decision of the administrative law judge (Pet. App. B23-B64), are reported at 334 N.L.R.B. No. 69. The Board's order denying petitioner's motion to reopen the record (Pet. App. C1-C6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2003. The petition for a writ of certiorari was filed on April 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner manufactures thermal plastic molding compound at a plant in Winona, Minnesota. Pet. App. A2. Petitioner's employees were initially represented for purposes of collective bargaining by the Winona Free Union. In February 1996, the employees voted to affiliate with the United Automobile, Aerospace & Agricultural Implement Workers of America (UAW or Union). *Id.* at A2, B2 & n.4; see *id.* at B25. Petitioner challenged that affiliation vote, however, by refusing to recognize and bargain with the UAW. *Id.* at A2, B25. On February 20, 1997, the National Labor Relations Board (Board) issued a decision finding that the affiliation vote was valid and that petitioner violated Section 8(a)(5) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(5), by "refusing to recognize [the UAW] as the certified bargaining unit representative."[1] *Miller Waste Mills, Inc.*, 323 N.L.R.B. 15, 22 (1997). The Board ordered petitioner to recognize and bargain with the UAW. Pet. App. A2, B2-B3.

On August 26, 1997, petitioner and the UAW began contract negotiations. Pet. App. B3. Petitioner's established practice was to grant employees an annual wage increase in the month of December or January. *Ibid.* On January 2, 1998, however, petitioner sent the employees a letter stating:

> During [the] December 11 meeting, the UAW Union Committee stated they would allow [petitioner] to give the employees an increase in pay and to decrease insurance costs. * * * You will recall when

[1] Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. 158(a)(5).

> [petitioner] raised wages last year, the UAW filed an unfair labor practice charge against us.
>
> * * * * *
>
> This is a sad occasion for all of us as this marks the first time in [petitioner's] long history we won't be giving you a wage increase at this time. Please understand this is not the way we do business. We are continually exploring ways to ensure that neither our employees nor [petitioner] are damaged any further by this fiasco.

Id. at B3-B4; see *id.* at A3-A4, B36-B37. On January 15, 1998, approximately half of petitioner's employees requested petitioner to "grant us a fair and decent wage increase and better insurance for 1998." *Id.* at B5, B37; see *id.* at A4.

The next day, January 16, 1998, petitioner sent the employees a letter stating that "regardless of the UAW and the NLRB * * * we are going to do what you asked" and that petitioner was granting a wage increase of 51 cents per hour (the largest pay increase ever granted by petitioner). Pet. App. A4, B5 & n.7, B6, B37. On February 13, 1998, petitioner sent its employees another letter, notifying them of a reduction in their health insurance costs. *Id.* at B5, B6, B37-38; see *id.* at A4.

On February 25, 1998, petitioner received notification from a law firm that a majority of the employees had signed a petition stating that they no longer wished to be represented by the UAW. Pet. App. B5, B8; see *id.* at A4-A5, B38. At a negotiation session on February 26, petitioner advised the Union that, based on the employee petition, it would no longer recognize and bargain with the Union. *Id.* at B5; see *id.* at A5, B39.

2. Acting on charges filed by the Union, the Board's General Counsel issued an unfair labor practice complaint against petitioner. Pet. App. B23, B24. The Board, in substantial agreement with the administrative law judge (ALJ), sustained the complaint in relevant part. *Id.* at B1, B6-B13; see *id.* at B45-B46, B47-B52.

a. The Board found that petitioner's January 2, 1998, letter "misrepresented the Union's bargaining positions and blamed the Union for preventing the employees from receiving their customary annual wage increase," in violation of NLRA Section 8(a)(1), 29 U.S.C. 158(a)(1).[2] Pet. App. B6. The Board further found that petitioner's letters of January 16 and February 13, 1998, constituted "direct dealing" with employees in violation of NLRA Section 8(a)(5). *Id.* at B6-B7. The Board noted that the January 16 letter informed the employees that petitioner was going to "do what you asked" and grant a wage increase "[r]egardless of" the Union. *Id.* at B6. The Board also noted that petitioner did not consult with the Union before sending these letters, even though they addressed matters pertaining to the terms of employment (*i.e.*, wages and health insurance costs). *Id.* at B6-B7.

The Board further found that petitioner violated Section 8(a)(5) when it withdrew recognition from the Union on the basis of the February 25, 1998, employee petition. Pet. App. B8-B13. The Board concluded that the February 25 employee petition was "tainted by

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[2] Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the NLRA, among which is the right "to form, join, or assist labor organizations." 29 U.S.C. 157.

[petitioner's] unfair labor practices" and that petitioner therefore "was not entitled to rely on the petition as a valid expression of employee sentiment." *Id.* at B8, B11, B13. In so concluding, the Board applied the settled principle that "an employer may not withdraw recognition from a union while there are unremedied unfair labor practices tending to cause employees to become disaffected from the union." *Id.* at B8. The Board emphasized that "[a]n employer cannot rely on an expression of disaffection by its employees which is attributable to its own unfair labor practices directed at undermining support for the union." *Id.* at B9. Applying its established test for determining whether a "causal relationship exists between the unremedied unfair labor practices and the subsequent expression of employee disaffection with an incumbent union," the Board found a "strong causal connection" between petitioner's three unlawful letters to the employees and "the employee petition on which [petitioner] relied in withdrawing recognition from the Union." *Id.* at B9-B11 (citing *Master Slack Corp.*, 271 N.L.R.B. 78 (1984)).[3]

The Board rejected petitioner's contention that its withdrawal of recognition was justified by other evidence of employee disaffection from the Union that "predated any alleged unfair labor practices." Pet. App. B11. The Board explained that, "[i]n analyzing

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[3] Under the Board's causation test, the relevant factors include: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the unlawful acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. *Master Slack Corp.*, 271 N.L.R.B. at 84. See Pet. App. B9.

the adequacy of an employer's defense to a withdrawal of recognition allegation, the Board will only examine factors actually 'relied on' by the employer." *Id.* at B12. The Board found that, when petitioner withdrew recognition from the Union, it "relied solely on the February 25 employee petition" (*id.* at B13) and "did not withdraw recognition because of 'other factors.'" *Ibid.*

b. To remedy petitioner's unlawful withdrawal of recognition from the Union, the Board, applying its decision in *Caterair International*, 322 N.L.R.B. 64 (1996), issued an affirmative bargaining order. Pet. App. B14; see *id.* at B18-B19.[4] The Board adhered to the view expressed in *Caterair* that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Id.* at B14-B15 (quoting 322 N.L.R.B. at 68). In addition, because the United States Court of Appeals for the District of Columbia Circuit has required the Board to justify, on the facts of each case, the issuance of an affirmative bargaining order under a three-part balancing test devised by the court, the Board undertook such an analysis here. *Id.* at B15-B17. The Board concluded that an affirmative bargaining order was also warranted under that balancing test. *Ibid.*

3. After the Board issued its decision, petitioner filed a motion to reopen the record. Pet. App. C1-C6.

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[4] If the Board has issued an affirmative bargaining order, it will not conduct, for a reasonable period of time, a decertification election among the employees covered by that order. By contrast, if only a cease-and-desist order has been issued, there is no temporary bar to the holding of a decertification election. See Pet. App. B15, B17; *Lee Lumber & Bldg. Material Corp.* v. *NLRB*, 310 F.3d 209, 219 (D.C. Cir. 2002); *Caterair Int'l*, 322 N.L.R.B. at 65.

Petitioner sought leave from the Board to adduce evidence of "changed circumstances" allegedly demonstrating that an affirmative bargaining order was not warranted. *Id.* at C2. The Board denied petitioner's motion to reopen the record because the motion did not comply with the Board's rules. *Id.* at C2-C3; see *id.* at C3-C6.

4. The Eighth Circuit enforced the Board's order. Pet. App. A2, A9. Applying the substantial evidence test, the court concluded that it was "in full agreement with the Board's findings." *Id.* at A7. The court concluded that the Board did not abuse its discretion in "directing [petitioner] to bargain with the UAW." *Id.* at A8. The court also concluded that the Board did not abuse its discretion in denying petitioner's motion to reopen the record. *Id.* at A9.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. A union is ordinarily entitled to an irrebuttable presumption of majority support for one year following its certification by the Board as the representative of a bargaining unit of employees. After the certification year, the union is entitled to a rebuttable presumption of majority support. *Auciello Iron Works, Inc.* v. *NLRB*, 517 U.S. 781, 785-786 (1996); *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 777-778 (1990). At the time of the events in this case, the Board generally permitted an employer to rebut the presumption of majority support for the union, and to withdraw recognition from the union, by demonstrating either (i) that the union did not in fact enjoy majority support

or (ii) that the employer had a good-faith doubt, based on a sufficient objective basis, of the union's majority support. *Auciello Iron Works*, 517 U.S. at 786-787; *Curtin Matheson*, 494 U.S. at 778.[5]

The Board's withdrawal-of-recognition rules, however, "assume[] that the employer did not commit any unfair labor practice." *Lee Lumber & Building Material Corp.* v. *NLRB*, 117 F.3d 1454, 1458 (D.C. Cir. 1997). When, as here, the employer commits unfair labor practices and withdraws recognition from a union in reliance on an employee petition that was tainted by those practices, the Board, with court approval, has repeatedly concluded that the employer's withdrawal of recognition violates NLRA Section 8(a)(5). See, *e.g.*, *Vincent Industrial Plastics, Inc.* v. *NLRB*, 209 F.3d 727, 737-738 (D.C. Cir. 2000); *NLRB* v. *Williams Enterprises, Inc.*, 50 F.3d 1280, 1288-1289 (4th Cir. 1995); *Radisson Plaza Minneapolis* v. *NLRB*, 987 F.2d 1376, 1383 (8th Cir. 1993); *NLRB* v. *Powell Elec. Mfg. Co.*, 906 F.2d 1007, 1014-1015 (5th Cir. 1990); *Hearst Corp.*, 281 N.L.R.B. 764, 764-765 (1986), enforced mem., 837 F.2d 1088 (5th Cir. 1988).

Consistent with that settled principle, the Board in this case concluded that petitioner violated Section 8(a)(5) when it withdrew recognition from the Union on the basis of the tainted February 25, 1998, petition. See

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[5] In *Levitz Furniture Co.*, 333 N.L.R.B. 717 (2001), the Board reexamined the applicable legal and policy considerations and decided to abandon its "good-faith doubt" standard for withdrawing union recognition. The Board concluded that an employer may withdraw recognition only by demonstrating that the union had in fact lost majority employee support. *Id.* at 717, 725. That changed interpretation did not affect cases then pending before the Board (such as the present case), because the Board elected to apply it only prospectively. *Id.* at 729. See Pet. App. B8 n.12.

Pet. App. B9-B11, B13. The conclusion of the court of appeals that substantial evidence supports that finding (see *id.* at A6, A7-A8) does not warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

b. Petitioner contends (Pet. 25-26) that, under this Court's decision in *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U.S. 359 (1998), petitioner established that it had a good-faith doubt as to the Union's majority status when it withdrew recognition. Petitioner asserts (Pet. 25) that "the record contains numerous items of evidence predating [petitioner's] alleged [unfair labor practices] that confirmed pre-existing employee disaffection with the UAW." There is no merit to these contentions.

In determining whether petitioner lawfully withdrew recognition from the Union, the Board applied the settled rule that it examines only those "factors actually 'relied on' by the employer." Pet. App. B12. See *Dayton Motels, Inc.*, 212 N.L.R.B. 553, 553 n.3, 556 (1974), enforced, 525 F.2d 476 (6th Cir. 1975) (per curiam). The Board, upheld by the court of appeals, correctly found that petitioner relied solely on the tainted February 25, 1998, employee petition in withdrawing recognition from the Union and that none of the "other factors" allegedly predating its violations "played any part whatsoever in [petitioner's] decision." Pet. App. B13; see *id.* at A6, A7.

Petitioner does not contest the validity of the *Dayton Motels* rule that the Board will examine only those factors upon which the employer actually relied to determine whether a withdrawal of recognition was lawful. Nor does the decision of this Court in *Allentown Mack* provide petitioner with a basis for circumventing *Dayton Motels*. In *Allentown Mack*, the Court

did not address the validity of the *Dayton Motels* rule. Instead, the Court concluded that substantial evidence did not support the Board's finding that the employer in that case lacked a good-faith reasonable doubt as to the union's continued majority status. 522 U.S. at 366-371. Consistent with the Board's decision here, the Court's analysis in *Allentown Mack* presupposed that the employer in that case had actually relied on the evidence under review. See *id.* at 369 (noting "the effect upon [the employer]" of an employee's statement); *id.* at 371 (finding that employer reasonably gave "great credence" to an assertion made by the union steward).

c. Petitioner contends (Pet. 26-27) that the Board failed to apply its established causation test in finding that petitioner's unfair labor practices tainted the February 25, 1998, employee petition. There is no merit to that contention. In *Lee Lumber & Building Material Corp.*, 322 N.L.R.B. 175 (1996), enforced in relevant part, 117 F.3d 1454 (D.C. Cir. 1997), the Board explained that, to determine whether there is "proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of [majority] support" for the union, the Board "considers several evidentiary factors," as delineated in *Master Slack Corp.*, 271 N.L.R.B. 78, 84 (1984). *Lee Lumber*, 322 N.L.R.B. at 177 & n.16.

Those *Master Slack* factors were explicitly applied by the Board in this case. See Pet. App. B9-B11; page 5 & note 3, *supra*. Applying those factors, the Board found a "strong causal connection" between petitioner's unfair labor practices and the February 25 employee petition. Pet. App. B10. Although petitioner suggests (Pet. 27) that certain conduct on the part of the Union may have caused employee dissatisfaction, petitioner does not challenge the validity of the Board's *Master*

Slack causation test and does not contend that the Board misapplied that test to the facts of this case.

d. Petitioner also contends (Pet. 27-28) that the February 25, 1998, employee petition was not tainted because its letters to employees of January 2, January 16, and February 13 did not constitute unfair labor practices. Petitioner asserts (Pet. 28) that its letters "were simple communications to the workforce regarding the status of changes at issue—all of which is protected free speech" under Section 8(c) of the NLRA, 29 U.S.C. 158 (c). There is no merit to petitioner's contention. Section 8(c) provides that the written expression of "views, argument, or opinion" shall not constitute an unfair labor practice "if such expression contains no threat of reprisal or force or promise of benefit." That provision does not shield employer communications that amount to unlawful direct dealing *(i.e.*, the January 16 and February 13, 1998 letters, Pet. App. B6-B7) or that interfere with protected employee rights (*i.e.*, the January 2, 1998 letter, *id.* at B6). See *Facet Enterprises, Inc.* v. *NLRB*, 907 F.2d 963, 969 (10th Cir. 1990) (communication that constitutes unlawful direct dealing not shielded by Section 8(c)); *Safeway Trails, Inc.* v. *NLRB*, 641 F.2d 930, 933 (D.C. Cir. 1979) (per curiam) (communication may fall outside Section 8(c) although it does not contain a "threat of reprisal or force or promise of benefit"), cert. denied, 444 U.S. 1072 (1980).[6]

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[6] In *Americare Pine Lodge Nursing & Rehabilitation Center* v. *NLRB*, 164 F.3d 867 (4th Cir. 1999), the court, addressing the relationship between unlawful direct dealing and Section 8(c) during contract negotiations, concluded that "the employer may freely communicate with employees in noncoercive terms, as long as those communications do not contain some sort of express or implied quid pro quo offer that is not before the union." *Id.* at 875.

2. a. To remedy petitioner's unlawful withdrawal of recognition from the Union, the Board, applying its decision in *Caterair International.*, 322 N.L.R.B. 64 (1996), issued an affirmative bargaining order. See Pet. App. B14-B15. Unlike a cease-and-desist order, an affirmative bargaining order temporarily precludes a challenge to the union's status as the employees' bargaining representative for a reasonable period of time. *Caterair*, 322 N.L.R.B. at 65. See Pet. App. B15, B17.

In *Caterair*, the Board addressed the view of the District of Columbia Circuit that, because of the potential impact of a temporary decertification bar on the right of employees to remove an incumbent union as their bargaining representative, the Board must justify an affirmative bargaining order in each case under a three-part test devised by the court. See, *e.g.*, *Vincent Industrial Plastics, Inc.* v. *NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000); *Peoples Gas System, Inc.* v. *NLRB*, 629 F.2d 35, 46 (D.C. Cir. 1980). After fully reexamining the pertinent legal and policy considerations, however, the Board in *Caterair* reaffirmed the Board's "longstanding policy that an affirmative bargaining order is the standard appropriate remedy for the restoration of the status quo after an employer's unlawful withdrawal of recognition from an incumbent union." 322 N.L.R.B. at 64. Although it applied that remedial policy in this case, in recognition of the District of Columbia Circuit's contrary view, the Board also applied that court's balancing test to the facts of this case.

The Board believes that *Americare Pine Lodge* reflects an unduly expansive construction of Section 8(c), and that the better view is reflected in cases such as *Facet Enterprises* and *Safeway Trails*, *supra*. In any event, petitioner does not rely on *Americare Pine Lodge* in support of its Section 8(c) claim in this case.

See Pet. App. B15-B17. The Board concluded that, even under that balancing test, "an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy" petitioner's NLRA violations. *Id.* at B17.

b. The Fourth Circuit has approved the Board's remedial approach and does not require a balancing test. *NLRB* v. *Williams Enterprises, Inc.*, 50 F.3d 1280, 1289-1290 (4th Cir. 1995). Petitioner errs, however, in contending (Pet. 15-16) that this case implicates the circuit conflict on the question whether the Board must apply the balancing test before issuing an affirmative bargaining order to remedy an unlawful withdrawal of recognition from an incumbent union.

The court of appeals in this case neither addressed nor objected to the holding of the District of Columbia Circuit that the Board must justify affirmative bargaining orders under a case-specific balancing test. Nor did the court of appeals in this case purport to adopt the differing view of the Fourth Circuit on that issue. Instead, the court simply concluded that the Board "did not abuse its discretion in directing [petitioner] to bargain with the UAW." Pet. App. A8. In reaching that conclusion, the court addressed and rejected petitioner's contention on appeal that the only proper remedy in this case would be a new election. See *id.* A8-A9; Pet. C.A. Br. 40 (contending that "if any remedy is deemed appropriate, a Board-conducted election should be held"). And, in rejecting that claim, the court (Pet. App. A8-A9) quoted extensively from this Court's decision in *NLRB* v. *P. Lorillard Co.*, 314 U.S. 512 (1942) (per curiam), which held that the court in that case had erred in requiring the Board to conduct an

election rather than enforce the Board's bargaining order.[7]

There is, in any event, no reason to believe that the outcome of this case would have been different in the District of Columbia Circuit or any other circuit. As noted above, the Board provided an alternative justification for the affirmative bargaining order under the balancing test. The subsequent Board decisions cited by petitioner (see Pet. 17 n.2) in which the Board has provided this alternative balancing analysis have routinely been enforced by the District of Columbia Circuit when review was in that court.[8] And, Board decisions containing an alternative analysis under the District of Columbia Circuit's test have also routinely been enforced in other courts of appeals.[9] There is

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[7] In support of its claim of a circuit conflict, petitioner cites (Pet. 15) the Eighth Circuit's decision in *NLRB* v. *Beverly Health & Rehabilitation Services, Inc.*, 187 F.3d 769 (1999). That case does not address the remedial question involved here. See *id.* at 772 (concluding that the Board did not abuse its discretion in "extending the certification year by six months" when the employer had bargained in bad faith with the union during the certification year).

[8] See *Marion Hosp. Corp.*, 335 N.L.R.B. No. 80, slip op. 4-5 (Aug. 27, 2001), enforced, 321 F.3d 1178 (D.C. Cir. 2003); *Trans-Lux Midwest Corp.*, 335 N.L.R.B. No. 22, slip op. 5-6 (Aug. 27, 2001), enforced, 53 Fed. Appx. 571 (D.C. Cir. 2002); *Metro Health, Inc.*, 334 N.L.R.B. No. 75, slip op. 3-4 (July 16, 2001), enforced, 49 Fed. Appx. 320 (D.C. Cir. 2002); *Scepter Ingot Castings, Inc.*, 331 N.L.R.B. 1509, 1509-1510 (2000), enforced, 280 F.3d 1053 (D.C. Cir. 2002).

[9] See *Horizon House Dev. Servs., Inc.*, 337 N.L.R.B. No. 9, slip op. 5-6 (Dec. 19, 2001), enforced, 57 Fed. Appx. 110 (3d Cir. 2003); *Bridgestone/Firestone, Inc.*, 332 N.L.R.B. 575, 577-578 (2000), enforced in relevant part *sub nom. Allied Indus. Employees* v. *NLRB*, 47 Fed. Appx. 449 (9th Cir. 2002); *Raven Services Corp.*,

therefore no reason to believe that the Board's affirmative bargaining order in this case would have been set aside in any circuit.

c. Petitioner contends (Pet. 17-20) that the decision of the court of appeals conflicts with decisions of other courts as to whether the Board must take into account "changed circumstances" and administrative delay in determining whether to issue an affirmative bargaining order in cases such as this one. There is no merit to that contention, for the opinion of the court of appeals does not address those issues in this case. Instead, the court simply held that the Board did not abuse its discretion in declining to grant petitioner's motion to reopen the record for the purpose of introducing evidence of changed circumstances that allegedly rendered an affirmative bargaining order unwarranted. Pet. App. A9; see *id.* at C1-C6. The court found that petitioner "fail[ed] to meet the requirements of the Board's rules and regulations that govern the reopening of the record" and "failed to promptly submit the new evidence or explain why it had not done so." *Id.* at A9. Those fact-specific rulings, which petitioner does not directly challenge, raise no issue warranting review by this Court.

Moreover, in denying petitioner's motion to reopen the record, the Board did consider the passage of time. The Board noted that petitioner had proffered evidence on whether "the amount of time that elapsed between [petitioner's] allegedly disaffection-causing, unlawful communications and the issuance of the Board's Decision and Order [would] render an affirmative bargaining order unnecessary and inappropriate." Pet. App.

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331 N.L.R.B. 651, 651-652 (2000), enforced, 315 F.3d 499 (5th Cir. 2002).

C5. The Board found, however, that petitioner had failed to carry its burden of demonstrating why the proffered evidence would support a retraction of the Board's affirmative bargaining order. *Ibid.* That case-specific ruling by the Board is not directly challenged by petitioner and does not, in any event, warrant review by this Court.[10]

d. Finally, relying on this Court's decision in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), petitioner contends (Pet. 20-21) that the Board's affirmative bargaining order in this case is "suspect because the Board failed to make any showing that the numerical majority [of employees] actually supported the UAW at any time, much less when [petitioner] withdrew recog-

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[10] Petitioner suggests that *NLRB* v. *Superior Fireproof Door & Sash Co.*, 289 F.2d 713 (2d Cir. 1961) (Pet. 19-20), and *Texas Petrochemicals Corp.* v. *NLRB*, 923 F.2d 398 (5th Cir. 1991) (Pet. 20), required the Board to hold an election solely on the ground of administrative delay. There is no merit, however, to the suggestion that the amount of time that elapsed in this case between petitioner's violations and issuance of the Board's order (about three and one-half years) constituted undue delay. In *Superior Fireproof*, the court conditioned its enforcement of a bargaining order on a Board election when, in addition to "inordinate" administrative delay, the union "had not given truly effective representation to the * * * employees" after it was certified. 289 F.2d at 723-724. In this case, by contrast, the Union was actively engaged in contract negotiation with petitioner when petitioner unlawfully withdrew recognition. See Pet. App. B3, B26-B40. And, in *Texas Petrochemicals*, the court conditioned its enforcement of a bargaining order on a Board election when, in addition to "lengthy" administrative delay, valid employee petitions indicated that a significant number of employees did not want to be represented by the union. 923 F.2d at 405-406. By contrast, in this case, the only petition bearing on employee union sentiment is the tainted, and therefore invalid, February 25, 1998, petition.

nition." Petitioner's contention lacks merit and its reliance on *Gissel* is misplaced.

In *Gissel*, this Court addressed the Board's authority to issue a bargaining order (instead of ordering an election) when a union seeks initial Board certification as the NLRA representative of the employees in the bargaining unit. See 395 U.S. at 614-615. Such a bargaining order ordinarily requires proof that the union enjoyed majority employee support—such as signed authorization cards. *Id.* at 614.

This case, however, does not involve a *Gissel*-type bargaining order. The Union in this case had already attained status as the Board-certified representative of petitioner's employees at the time of petitioner's unlawful withdrawal of recognition. In its February 20, 1997, decision, the Board had rejected petitioner's challenge to the employees' vote to change their union affiliation from the Winona Free Union to the UAW. The Board found that petitioner unlawfully refused to "recognize [the UAW] as the certified bargaining unit representative" of its employees. *Miller Waste Mills, Inc.*, 323 N.L.R.B. 15, 22 (1997).

Having been certified by the Board as the employees' bargaining representative on February 20, 1997, the Union was entitled to a rebuttable presumption of majority status when petitioner unlawfully withdrew recognition from it one year later. See *Auciello Iron Works, Inc.* v. *NLRB*, 517 U.S. 781, 785-786 (1996); *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 777-778 (1990); page 7, *supra*. The bargaining order in this case thus simply restores the Union to its presumptive status as the Board-certified majority representative of petitioner's employees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the
Supreme Court of the United States

MILLER WASTE MILLS, INC.,
d/b/a RTP COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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REPLY ARGUMENT

Petitioner RTP Company respectfully offers this reply argument in response to the Board's Brief in Opposition to the Petition for Certiorari.

A pivotal issue in this case and many others like it is the propriety of the Board's affirmative bargaining order when the Board itself delayed processing the case for several years. (See Pet. i, Issue 1). This case warrants review if for no other reason than the Board did not and cannot justify its administrative appointment of the UAW as the bargaining agent for employees who were not even working for RTP when the underlying events in this case arose years ago. In the Board's Brief in Opposition (much like the Board's Order), the Board essentially ignores[1] its own delay and the

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[1] The only point in the Brief when the Board addresses its own "administrative delay" is when it argues that it was under no obligation to grant RTP's Motion to reopen the record to present evidence of why changes within the workforce and the passage of time rendered a bargaining order inappropriate. (See Board Brief at 15-16). The Board denied Petitioner an opportunity to reopen the record on the grounds that the Motion was untimely because Petitioner should have brought the Motion as soon as any "circumstances" changed. (Pet. C-2,3) As such, the Board apparently expects employers to present evidence on changed circumstances while the Board's decision is still pending, before the employer even knows whether or not it won or lost on the underlying merits in a withdrawal of recognition case. To do so would require clairvoyance on the part of the employer. Prior to the time when the Board actually issues its decision, the employer has no idea whether the Board will even hold that a ULP occurred. In other words, adopting the Board's reasoning would require an employer to file a motion to reopen the record regarding a *possible* bargaining order when the employer does not even know if it won or lost, much less when the Board might issue its decision.

The Board's reasoning that employers should be required to file contingent motions to reopen the record just in case they eventually lose

practical ramifications that said delay will have if this bargaining Order stands. Reducing the Board's Brief to its basic components, the Board essentially takes the position that it is free to take as long as it wants (in this case, well over three years) to decide withdrawal of recognition cases, and if it finds an employer in violation of the Act, an affirmative bargaining order is *the* remedy even where the Board makes no effort to explore whether or not a Board-conducted election might better protect the Section 7 rights of *current* employees.

The Board simply will not consider the detrimental by-products of its procrastination. In the Board's own words, the Board "does not consider passage of time and turnover among bargaining unit employees in determining whether a bargaining order is appropriate, but rather assesses the appropriateness of this remedy based on the situation at the time the unfair labor practices were committed." Cogburn Healthcare Center, 335 NLRB No. 105 at slip op. p. 5 (2001); see also Overnite Transportation Co. v. NLRB, 280 F.3d 417, 437 (4th Cir. 2002). Under the Board's standard, the passage of time is apparently irrelevant.

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should be rejected. See Montgomery Ward & Co., Inc. v. NLRB, 904 F.2d 1156, 1158 (7th Cir. 1990) (employer filed motion to reopen record after Board imposed affirmative bargaining order, which the Board then denied; the Court remanded, instructing the Board to consider changed circumstances). Evidence of changed circumstances only becomes relevant *after* the Board decides that a bargaining order is the appropriate remedy. Requiring an employer to file a motion to reopen the record before knowing whether the Board intends to issue a bargaining order puts the cart before the horse. It is patently unreasonable to expect an employer to file a new motion every time another employee quits or is terminated.

That conclusion does not reflect the realities of today's workplace. The Board has no idea whether RTP's current employees were even employed when RTP sent out its three allegedly unlawful letters back in 1998. The Board cannot seriously claim to know whether RTP's current employees actually want to be represented by the UAW, as opposed to some other union, or no union at all. A Board-conducted election, with its procedural safeguards, could have answered all of these questions. Instead, the Board administratively ensconced the UAW as the bargaining representative "for a reasonable period of time." (Pet., B-14-22).

Unfortunately, a three and one-half year delay is all too common in cases before the Board. For example, in J.L.M., Inc. v. NLRB, 31 F.3d 79 (2d Cir. 1994), the Court reviewed a bargaining order that was issued three and one-third years after the last ULP — nearly the same amount of time that passed here. In doing so, the Court noted that:

> The passage of so much time sheds doubt on the Board's finding that the [employer's] employees continue to feel the effects of the ULPs. In addition to the possibility that employees may have totally forgotten the incidents, enough time may have passed to have at least made the chance of a fair rerun election greater than "slight."

Id. at 384.

The same is true here. The Board erred by summarily refusing to consider the effects of its own delay.

In short, this case should be reviewed because, *inter alia*, the Board should not be able to cavalierly impose affirmative bargaining orders where the Board refuses to consider the effect of its own delay on current employees' Section 7 rights, and when this union -- the UAW -- never demonstrated that it actually had the numerical support of the majority of RTP's employees at any time. RTP respectfully submits that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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